Supreme Court, U.S.
FILED
JUL 8 1996
OFFICE OF THE CLERK

No. 96-31

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

EVELYN SMITH,

Petitioner,

v.

FAIR EMPLOYMENT AND HOUSING COMMISSION, KENNETH PHILLIPS, AND GAIL RANDALL,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of California

PETITION FOR WRIT OF CERTIORARI

WENDELL R. BIRD
BIRD & MYERS
1150 Monarch Plaza
3414 Peachtree Road, NE
Atlanta, Georgia 30326
(404) 264-9400

JORDAN W. LORENCE*
CIMRON CAMPBELL
JANE E. HARDO
MARK N. TROOBNICK
Box 2074
Fairfax, Virginia 22031
(703) 359-8619

**Counsel of Record*

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. 1-800-347-8208

QUESTIONS PRESENTED

California imposed substantial penalties and a cease-and-desist order on Evelyn Smith, a widow and landlord who earns her living by renting four one-bedroom units that she owns, when she refused to rent to an unmarried couple because of her religious convictions against facilitating fornication.

1. Whether the court below erred in holding that prohibiting and penalizing religiously motivated conduct imposes no substantial burden on the exercise of religion, under the Religious Freedom Restoration Act or the Free Exercise Clause, if people may avoid the penalties by selling their property and permanently abandoning their occupations?

2. Whether a ban on housing discrimination against unmarried couples, as applied to an owner of four rental units who has sincere religious objections to facilitating fornication, serves a compelling interest by the least restrictive means where:

a. The state does not pursue its alleged interest uniformly, because the fair housing statute permits all state-operated and private colleges and universities to exclude unmarried couples from campus housing, and because state law discriminates between married and unmarried couples in myriad other ways; and

b. The state offered no evidence that unmarried couples have serious difficulty finding housing?

PARTIES

All parties are listed in the caption.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES ii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS 2

STATEMENT OF THE CASE 2

A. Mrs. Smith's Religion-based Reasons for Opposing Cohabitation. 2

B. Phillips-Randall Application and Cohabitation 3

C. The Administrative Hearing and Decision 4

D. California Court of Appeal Decision 7

E. California Supreme Court Decision 9

REASONS FOR GRANTING THE PETITION 11

I. THIS COURT SHOULD GRANT REVIEW BECAUSE THE DECISION BELOW CONFLICTS WITH THIS COURT'S DEFINITION OF "SUBSTANTIAL BURDEN" 11

A. The California Supreme Court's Decision Makes Protection Under RFRA and the Free Exercise Clause Inaccessible to Most People, By Making the "Substantial Burden" Requirement Too Difficult to Meet. 11

B. This Court Has Ruled That Governmental Prosecution and Punishment Are Obvious Examples of a Substantial Burden on One's Free Exercise Rights. 18

II. THIS COURT SHOULD GRANT REVIEW BECAUSE THE CALIFORNIA SUPREME COURT'S DECISION GREATLY ADDS TO THE CONFUSION IN THE LOWER COURTS OVER WHAT IS A BURDEN UNDER THE FREE EXERCISE CLAUSE AND RFRA. 20

A. This Decision Conflicts with Decisions by the Massachusetts, Alaska and Minnesota Supreme Courts. 20

B. Federal Appeals Courts Use Multiple and Conflicting Tests To Determine What is a Substantial Burden Under RFRA 23

III. THIS COURT SHOULD ACCEPT THIS CASE TO DETERMINE WHETHER CALIFORNIA HAS A COMPELLING STATE INTEREST TO JUSTIFY ITS SUBSTANTIAL BURDEN ON MRS. SMITH'S RIGHTS 25

IV. MRS. SMITH STATES CLAIMS UNDER THE FREE EXERCISE CLAUSE 28

CONCLUSION 30

APPENDIX 1a

CALIFORNIA SUPREME COURT OPINION 1a

CALIFORNIA COURT OF APPEAL'S OPINION 155a

CALIFORNIA FAIR EMPLOYMENT AND HOUSING COMMISSION'S ADMINISTRATIVE DECISION 194a

TABLE OF AUTHORITIES

Cases:

Attorney General v. Desilets,
418 Mass. 316, 636 N.E.2d 233 (1994) . . . 14, 21, 27

Braunfeld v. Brown,
366 U.S. 599 (1961) 18

Church of the Lukumi Babalu Aye v. City of Hialeah,
508 U.S. 520 (1993) 15, 26

Dolan v. City of Tigard,
114 S.Ct. 2309, 129 L.Ed.2d 304 (1994) 29

Employment Division v. Smith,
494 U.S. 872 (1990) 7, 8, 28

Florida Star v. B.J.F.,
491 U.S. 524 (1989) 26

Frazee v. Illinois Department of Employment Security,
489 U.S. 829 (1989) 15

Grayned v. City of Rockford,
408 U.S. 104 (1972) 16

Hicks v. Garner,
69 F.2d 22 (5th Cir. 1995) 24

Hobbie v. Unemployment Appeals Commission of Florida,
480 U.S. 136 (1987) 15, 17

In re Cummings,
30 Cal.3d 870, 180 Cal.Rptr. 826,
640 P.2d 1101 (1982) 26

Jessen v. Keystone Savings & Loan Association,
142 Cal.App.3d 454, 191 Cal.Rptr. 104
(4th Dist. 1983) 13

Jimmy Swaggart Ministries v. California Bd. of Equalization,
493 U.S. 378 (1990) 22

Lucas v. South Carolina Coastal Council,
505 U.S. 1003 (1992) 29

Mack v. O'Leary,
80 F.3d 1175 (7th Cir. 1996) 24

Meyer v. Nebraska,
262 U.S. 390 (1923) 14

Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue,
460 U.S. 575 (1983) 26

Norman v. Unemployment Insurance Appeals Board,
34 Cal.3d 1, 192 Cal.Rptr. 134, 663 P.2d 904
(1983) 26

Schneider v. State,
308 U.S. 147 (1939) 16

Sherbert v. Verner,
374 U.S. 398 (1963) 7, 15, 17-19

Simon v. Schuster, Inc., v. Members of N.Y. State Crime Victims Bd.,
502 U.S. 105 (1991) 26

Smith v. Daily Mail Publishing Co.,
443 U.S. 97 (1979) 27

State by Cooper v. French,
460 N.W.2d 2 (Minn. 1990) 14, 23, 27

Swanner v. Anchorage Equal Rights Commission,
874 P.2d 274 (Alaska 1994) 14, 22, 27

Swanner v. Anchorage Equal Rights Commission,
115 S.Ct. 460, 130 L.Ed.2d 368 (1994) . passim

Thomas v. Review Board,
450 U.S. 707 (1981) 15, 17, 18

Wisconsin v. Yoder,
406 U.S. 205 (1972) 15, 19, 27

Wooley v. Maynard,
430 U.S. 705 (1977) 28

Constitution and Statutory Authorities:

United States Constitution, Amendment I . . . . . *passim*

28 U.S.C. §1257 2

Religious Freedom Restoration Act (RFRA)
42 U.S.C. §2000bb . . . . . *passim*

California Civil Code §51 (Unruh Act) 2, 4

California Civil Code §3387 13
California Government Code § 12948 2
§ 12955 (a) & (d) . 2
§ 12995 . . . 2, 9, 26

California Health and Safety Code §25955(a). 16

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

NO. _____

EVELYN SMITH,

PETITIONER,

V.

FAIR EMPLOYMENT AND HOUSING COMMISSION, KENNETH PHILLIPS, AND GAIL RANDALL,

RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

OPINIONS BELOW

The California Supreme Court's opinion is reported at 12 Cal.4th 1143, 51 Cal.Rptr.2d 700, 913 P.2d 909 and appears in the Appendix at 1a. The California Court of Appeal's opinion is reported at 30 Cal.Rptr.2d 395 and appears in the Appendix at 155a. The California Fair Employment and Housing Commission's administrative decision is not reported, and appears in the Appendix at 194a.

JURISDICTION

The California Supreme Court issued its decision in this case on April 9, 1996. This Court has jurisdiction to review this decision under 28 U.S.C. §1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The United States Constitution, Amendment I, the Religious Freedom Restoration Act, 42 U.S.C. §2000bb and various provisions of the California Fair Employment and Housing Act (California Government Code §§ 12948, 12955 (a) & (d) and 12995) and the Unruh Act (California Civil Code §51) are all found at App. 218a-220a.

STATEMENT OF THE CASE

Evelyn Smith is a 64-year-old widow who lives in Chico, California. Mrs. Smith earns her livelihood by managing and renting four one-bedroom town homes that she owns. App. 196a. Mrs. Smith does not live in these units. *Id.* Mrs. Smith began renting the town homes 1-3 years before the California Legislature prohibited marital status discrimination in housing in 1975. Hearing Transcript Vol. II, p. 70 and App. 13a.

A. Mrs. Smith's Religion-Based Reasons for Opposing Cohabitation.

Mrs. Smith is a Christian. App. 196a-197a. She has been a member of Bidwell Presbyterian Church in Chico since 1962. *Id.* Mrs. Smith believes that sex outside of marriage is sinful, and that it is a sin for her to rent her town homes to people who would engage in fornication on her property. App. 197a. Mrs. Smith "would not rent to anyone who engages in sex outside of marriage, whether they are single, divorced, widowed or

married." *Id.* Mrs. Smith believes that if she rents her units to people who will engage in sex outside of marriage there, God will punish her eternally and she would never see her deceased husband again in heaven. *Id.*

Mrs. Smith has received so many inquiries from unmarried couples that when someone calls about renting a unit, Mrs. Smith tells them that she prefers married couples, because of her religious beliefs against fornication. App. 196a.

Mrs. Smith has rented her units to people who are single, divorced, widowed and married. App. 197a. Mrs. Smith rents her town homes to people without regard to their race, color, national origin, ancestry or physical disability. *Id.* She has rented to men and women. She has rented to people of various religious faiths. She never inquires about a potential tenant's religious faith. *Id.*

B. Phillips-Randall Application and Cohabitation.

In late March and early April 1987, Mrs. Smith advertised in the local newspaper that she had a vacancy in one of her four units. Kenneth Phillips and Gail Randall, an unmarried couple who were living together, saw the advertisement and contacted Mrs. Smith about renting the place. *Id.* At the time of the incident, Randall was a full-time student at California State University, Chico. App. 199a. Phillips ran a landscaping business, together with Randall. *Id.* Gail Randall and Kenneth Phillips had been living together for more than five years at the date of the hearing in April 1988. App. 181a. They had never been married. App. 198a.

Mrs. Smith gave them a tour of the unit on April 2, 1987. At that time, Phillips falsely told Mrs. Smith that they were married. App. 198a. Later, Phillips and Randall called Mrs.

Smith again and told her they were interested in renting the unit. They met on April 7, 1987, gave her a deposit of $150 and signed a lease. App. 198a. On the rental agreement, Gail Randall signed her name as, "Gail Phillips," although that was not her name and has never been her name. *Id.* Around the same time, Gail Randall also joined the Kangaroo Kourts athletic club by using the name, "Gail Phillips," because the membership fee was less expensive for married couples. Transcript of Hearing, Vol. II, pp. 37-38.

Later that day, Gail Randall called Mrs. Smith and asked if she doubted that Randall and Phillips were married. *Id.* Mrs. Smith said she believed what they had told her. Randall persisted, and repeatedly asked Mrs. Smith if she wanted to see their marriage license. Mrs. Smith said, "no." App. 198a.

Still later on April 7, Kenneth Phillips called Mrs. Smith, and told her for the first time that he and Gail Randall were not married. When confronted with this revelation, Mrs. Smith said that she could not rent to an unmarried cohabiting couple, because that would violate her religious beliefs. *Id.* Mrs. Smith then sent them a check refunding their $150 deposit. *Id.*

C. The Administrative Hearing and Decision.

Phillips and Randall filed complaints with the California Department of Fair Employment and Housing accusing Mrs. Smith of unlawful marital status discrimination, under the California Fair Employment and Housing Act, Government Code §§ 12900 *et seq.* and the Unruh Civil Rights Act, Civil Code §§ 51 *et seq.*

The Fair Housing Commission conducted a two-day administrative hearing on April 25 and 26, 1988, in Chico, California. The Commission heard evidence at that hearing.

At the administrative hearing, Mrs. Smith argued that the Free Exercise Clause of the First Amendment exempted her from punishment under the state fair housing laws for marital status discrimination. Mrs. Smith also argued that the compelled sign-posting requirement violated her rights under the Freedom of Speech Clause. App. 208a-9a, 212a.

On August 17, 1989, the Commission issued its decision against Mrs. Smith. That decision is not reported. It appears at 194a. The Commission found that Mrs. Smith's actions violated the Fair Employment and Housing Act's and the Unruh Act's prohibitions on marital status discrimination. Although Mrs. Smith raised the Free Exercise Clause and the Freedom of Speech Clause as defenses (208a-9a, 212a), the Commission declined to rule on her constitutional claims, saying that the state constitution bars administrative agencies from doing so (*Id.*). The Commission ordered Mrs. Smith:

1. To cease and desist from marital status discrimination against unmarried couples in housing.

2. To pay the complainants $954 in damages; [This amount was later reduced to $454 after a decision by the California Supreme Court stating that the Commission could not award damages for emotional distress. See App. 8a, n.5.]

3. To sign and post copies of a notice detailing the litigation (and the fact that Mrs. Smith had lost) in her rental units for 90 days after the effective date of the decision;

4. To sign and post permanently in her rental units a poster describing tenants' rights under the Fair Employment and Housing Act. The two signs were attached to the Commission's opinion (the first sign - App. 215a; the second sign - App. 216a-217a). The first sign read as follows (App. 215a):

NOTICE
to
APPLICANTS FOR RENTAL HOUSING
offered by
EVELYN SMITH

After a full hearing, the California Fair Employment and Housing Commission has found that Evelyn Smith, the owner of rental property at 675-685 Eastwood Avenue, Chico, California, violated the California Fair Employment and Housing Act by refusing to rent to two applicants because they were an unmarried couple. (DFEH v. Evelyn Smith (1989) FEHC Dec. No. 89-11).

As a result of this finding, the Commission has ordered posting and distribution of this Notice and:

1) Payment to those applicants of money damages for their out-of-pocket losses and for their emotional injury; and

2) Posting and distribution of official notices and posters concerning rental applicants' rights and remedies under the California Fair Employment and Housing Act.

Dated : _____ By: _____
Evelyn Smith

THIS NOTICE IS REQUIRED TO BE POSTED UNDER PENALTY OF LAW BY THE CALIFORNIA FAIR EMPLOYMENT AND HOUSING COMMISSION. IT SHALL REMAIN POSTED FOR 90 DAYS IN THIS LOCATION AND SHALL NOT BE ALTERED, REDUCED, OBSCURED, OR OTHERWISE TAMPERED WITH IN ANY WAY THAT HINDERS ITS VISIBILITY.

D. California Court of Appeal Decision.

Mrs. Smith appealed to the California Court of Appeal. Although the parties submitted all of their briefs by January 1990, the Court of Appeal did not schedule oral arguments until January 1994.

During that four-year period, two major changes occurred in religious liberty law. First, this Court issued its opinion in *Employment Division v. Smith,* 494 U.S. 872 (1990), which significantly changed the test for cases arising under the Free Exercise Clause. Before *Smith*, this Court used the compelling state interest test for free exercise cases outlined in *Sherbert v. Verner*, 374 U.S. 398 (1963). The compelling state interest test states that if government action burdens the sincere religious exercise of a person, the government would have to justify that burden by showing it served a compelling state interest, implemented by the least restrictive means. In *Employment Division v. Smith*, this Court said that the compelling state interest test could not be used to challenge general laws that were formally neutral toward religion. The compelling state interest test would apply only to laws targeting religion, or cases involving "hybrid rights," that is, a free exercise claim combined with another constitutional claim, such as freedom of speech or association.

The second major change in religious liberty law was the enactment of the Religious Freedom Restoration Act (RFRA), 42 U.S.C. §2000bb *et seq.* in November 1993. RFRA created a statutory right to use the compelling state interest test to decide free exercise cases, as this Court had done to decide free exercise cases before *Employment Division v. Smith.* RFRA became law about two months before the California Court of

Appeal heard oral arguments in this case.

At the oral arguments in January 1994, the parties argued their positions on RFRA and the "hybrid rights" claims under *Employment Division v. Smith.* The Court of Appeal requested post-hearing briefs discussing RFRA and the "hybrid rights" issue.

Mrs. Smith argued in her post-hearing brief that the case should be decided under the RFRA, because it applied retroactively to all cases pending in court at the time of its enactment in November 1993. See RFRA 42 U.S.C. at §2000bb-3(a). Mrs. Smith also argued that the Commission had violated her "hybrid rights" -- free exercise plus freedom of speech, because the Commission was compelling her to post the signs against her will in violation of her religious beliefs.

On May 26, 1994, The California Court of Appeal reversed the ruling of the Commission, and found that the Commission's order violated Mrs. Smith's rights under the federal and state constitutions' Free Exercise Clauses. The Court of Appeal ruled that Mrs. Smith stated a hybrid claim under *Employment Division v. Smith* -- freedom of speech plus free exercise of religion. The Court of Appeal held that this case presented a hybrid rights claim because the Commission's requirement that Mrs. Smith sign and post notices in her rental units violated her free speech rights under the First Amendment. App. 166a-172a.

The Court of Appeal ruled that the Commission had substantially burdened Mrs. Smith's free exercise rights by prosecuting and punishing her for her actions in this case. The Court of Appeal further ruled that the state lacked a compelling state interest to justify its burden on Mrs. Smith's rights. That court pointed out that the Fair Employment and Housing Act,

under which Mrs. Smith was convicted, specifically empowered all public and private colleges and universities to prohibit unmarried couples from living together in campus housing, by allowing the schools to set up married student housing and single sex dorms. California Government Code § 12995 (2).

The Court of Appeal pointed out that all of the state universities had the authority to refuse to rent living space to unmarried cohabiting couples, which was the very thing the state was punishing Mrs. Smith for doing. App. 177a, n.12. At the time this case occurred, Gail Randall was a student at Chico State University. App. 199a. The state university would not allow her to cohabit with a man in the state's student housing.

Further, the Court of Appeal said the state lacked a compelling state interest because the Legislature and the state courts had refused to extend the legal rights and privileges that married couples have to unmarried couples.

The Court of Appeal found it unnecessary to address the RFRA claim because it uses the same compelling state interest test the Court of Appeal used to decide the federal Free Exercise Clause hybrid right claim. App. 155a. The Commission, Phillips and Randall (the unmarried couple) appealed to the California Supreme Court.

E. California Supreme Court Decision.

The California Supreme Court granted review in this case and reversed the Court of Appeal by a 4-3 vote on April 9, 1996. Although there was no majority opinion, a majority of that court held that:

1) Mrs. Smith suffered no "substantial burden" sufficient to

trigger protection under the Free Exercise Clause; and

2) The Religious Freedom Restoration Act offers no protection for Mrs. Smith because she suffered no substantial burden under RFRA (Justice Werdegar's opinion) or because RFRA is unconstitutional (Justice Mosk's opinion).

The plurality opinion, written by Justice Werdegar, ruled that the state had not substantially burdened Mrs. Smith's rights under the federal Free Exercise Clause or RFRA because she could "avoid the conflict, without threatening her livelihood, by selling her units and redeploying the capital in other investments." App. 32a. Therefore, "she can avoid the burden on her religious exercise without violating her beliefs or threatening her livelihood." App. 40a.

Additionally, the plurality opinion said there was no substantial burden on Mrs. Smith's religious liberty because "the landlord's request for an accommodation in the case before us has a serious impact on the rights and interests of third parties." App.32a-33a.

In a concurring opinion, the fourth justice of the majority against Mrs. Smith, Justice Mosk, stated that he "generally concur[ed] in the opinion prepared by Justice Werdegar"(App. 47a). He added that RFRA is unconstitutional because Congress violated the separation of powers by passing it. *Id.*

Chief Justice Lucas and Justices Kennard and Baxter dissented. Justice Kennard wrote the first dissenting opinion saying that the state had substantially burdened Mrs. Smith's rights under the Free Exercise Clause and RFRA, and that the state lacked a compelling interest to justify that burden. App. 65a-103a.

Justice Baxter, joined by Chief Justice Lucas, agreed that the state had substantially burdened Mrs. Smith's rights under RFRA. Justice Baxter wanted to remand the case to see if the state could prove a compelling state interest under RFRA. App. 104a-154a. Justice Kennard correctly said that there was no need to remand, because the case had been tried under the old *Sherbert-Yoder* test, which contained the compelling state interest requirement now present in RFRA. App. 99a, n.8.

REASONS FOR GRANTING THE PETITION

I.

THIS COURT SHOULD GRANT REVIEW BECAUSE THE DECISION BELOW CONFLICTS WITH THIS COURT'S DEFINITION OF "SUBSTANTIAL BURDEN"

A. The California Supreme Court's Decision Makes Protection Under RFRA and the Free Exercise Clause Inaccessible to Most People, By Making the "Substantial Burden" Requirement Too Difficult to Meet.

With its 4-3 decision, the California Supreme Court has pushed out of reach for most people the protections of the Religious Freedom Restoration Act and the Free Exercise Clause. Few people could ever meet that court's extreme definition of "substantial burden." The California Supreme Court ruled that the state's actions forcing Mrs. Smith to violate her religious beliefs or permanently abandon her rental business did not substantially burden her free exercise of religion under RFRA or the Free Exercise Clause because Mrs. Smith could sell her town houses and give up her chosen occupation. That court reasoned that no matter how coercive

the government's actions against Mrs. Smith have been, the government escapes all judicial scrutiny under RFRA or the Free Exercise Clause because Mrs. Smith could "avoid the conflict, without threatening her livelihood, by selling her units and redeploying the capital in other investments." App. 32a. In other words, if Mrs. Smith would sell her property and stop earning her living as a landlord, the conflict would end and any burden on her religious exercise disappears.

The California Supreme Court's shallow analysis is clearly wrong because Mrs. Smith can do nothing at the present time to eliminate the punishments the state has levied against her. She is burdened *now* by the Commission's ruling.

The California Supreme Court also ignores the crushing impact of its decision on Mrs. Smith. Mrs. Smith earns her living by "actively managing her rental property," (Kennard, J. dissenting, App. 81a). Selling her units would massively disrupt her life. She would have to pay capital gains taxes on these units she bought in the early 1970's, give up an occupation she enjoys, and find another way to support herself.

In addition to those significant economic burdens, Mrs. Smith must also endure punishment for violating the state fair housing laws. As Justice Kennard described it in her dissent:

> For following her religious beliefs rather than [the California Fair Employment and Housing Act] Smith is subject to civil penalties, a cease-and-desist order dictating her future conduct, and imprisonment. (App.80a).

The California Supreme Court ignored these burdens on Mrs. Smith and instead, created an unprecedented definition of substantial burden: If the religious adherent can do something

to remove herself from the legal conflict, there is no burden on her religious exercise, no matter how onerous the government's actions are in the particular case. Because Mrs. Smith could sell her properties and get out of the landlord business, there is no burden on her rights under RFRA or the Free Exercise Clause.

In other contexts, California law provides that loss of these units is presumptively irreparable injury, not adequately remedied by monetary compensation. *See, e.g.,* California Civil Code §3387 (presumptively authorizing specific performance of contracts for sale of land); *Jessen v. Keystone Savings & Loan Association,* 142 Cal.App.3d 454, 191 Cal.Rptr. 104, 107 (4th Dist. 1983) (ruling that damages would not be an adequate remedy for loss of two rental units). It is absurd to hold by contrast that forced sale of these units is no substantial burden on Mrs. Smith's rights to religious liberty.

In similar landlord cases, Justice Clarence Thomas and three state supreme courts found these penalties to be a substantial burden under the compelling state interest test used in RFRA. In his dissent from denial of certiorari in *Swanner v. Anchorage Equal Rights Commission*, 115 S.Ct. 460, 130 L.Ed.2d 368 (1994), Justice Thomas said the government "substantially burdened" the RFRA rights of the landlord with religious convictions against renting to unmarried couples when the government prosecuted him for housing discrimination:

> I would grant certiorari to resolve whether, under RFRA, an interest in preventing discrimination based on marital status is sufficiently "compelling" that respondent may *substantially burden* petitioner's exercise of religion.

Swanner, 130 L.Ed.2d at 368 (emphasis added).

The state supreme courts of Massachusetts, Alaska and Minnesota also found that prosecuting landlords for marital status discrimination for refusing to rent to unmarried couples substantially burdened their exercise of religion. *See Attorney General v. Desilets*, 418 Mass. 316, 636 N.E.2d 233 (1994); *Swanner v. Anchorage Equal Rights Commission*, 874 P.2d 274, 281 (Alaska 1994) and *State by Cooper v. French*, 460 N.W.2d 2 (Minn. 1990). These cases are discussed more fully in Section II-A. All three state supreme courts found that the government had substantially burdened the religious freedom of the landlords, even though the landlords did not prevail in all three of those cases.

The California Supreme Court justifies its novel approach to determining "substantial burden" by stating that Mrs. Smith "does not claim that her religious beliefs require her to rent apartments; the religious injunction is simply that she not rent to unmarried couples." App. 34a.

Whether Mrs. Smith believes "God called her to be a landlord" is irrelevant to this case. The California Supreme Court erred by not analyzing this case at the point where Mrs. Smith's religious beliefs conflict with the legal requirement. Here, California law says landlords must rent to unmarried cohabiting couples. Mrs. Smith said that she could not, due to her religious beliefs. This is not a conflict about Mrs. Smith *demanding to be a landlord* when state law says she may not.

Also, there is no requirement that Mrs. Smith must have a religious belief to do something she already has the constitutional right to do -- to choose a common occupation, such as being a landlord. Her liberty interests under the Fourteenth Amendment protect "the right of the individual ... to engage in any of the common occupations of life." *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). California has no plenary

power to order people in or out of specific occupations. Whether Mrs. Smith feels "called by God" to be a landlord has no bearing on the RFRA and Free Exercise Clause analyses in this case, because it is not the point where state law and her religious convictions collide.

The California Supreme Court's reasoning grossly conflicts with decisions of this Court. For example, under the reasoning of the California Supreme Court, this Court should have ruled against the workers in the cases of religious adherents seeking unemployment compensation for losing their jobs, by ruling that the workers could have all found other jobs. None of these employees had religious beliefs that they had to work at their specific jobs. *See Sherbert v. Verner*, 374 U.S. 398, 404 (1963); *Thomas v. Review Board*, 450 U.S. 707, 713-14 (1981); *Hobbie v. Unemployment Appeals Commission of Florida*, 480 U.S. 136 (1987); and *Frazee v. Illinois Department of Employment Security*, 489 U.S. 829 (1989).

Additionally, this Court should have ruled against the Amish in *Wisconsin v. Yoder*, 406 U.S. 205 (1972) or the members of the Santeria faith in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) by telling them to move out of Wisconsin and the City of Hialeah respectively, and simply go somewhere else. The Amish had no religious belief that they had to live in Wisconsin, nor the Santeria church a belief that it had to locate in Hialeah.

In other contexts, this reasoning would be unthinkable. A court would never dismiss a complaint by a woman alleging sexual harassment at her workplace on the grounds that she could resolve the conflict by "quitting and finding another job."

At the very least, the ruling below means that all regulations that apply to particular occupations or types of property are

totally immune from scrutiny under RFRA or the Free Exercise Clause. Anyone challenging a legal requirement on religious liberty grounds could always resolve the burden by changing occupations, or by selling their property. As Justice Kennard noted in dissent, a law requiring obstetricians to perform abortions would impose no substantial burden on anyone's religion, because people aren't usually compelled by their religious beliefs to be obstetricians. App. 91a. The California Legislature understands that people in the health professions may have religious objections to participating in abortion procedures, so state law exempts medical personnel from doing them. California Health & Safety Code §25955(a).

This Court has *rejected* the view that the government may infringe on someone's First Amendment freedom of expression if the person can exercise it somewhere else. "One is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Grayned v. City of Rockford*, 408 U.S. 104, 119 n. 40 (1972), quoting *Schneider v. State*, 308 U.S. 147, 163 (1939). Likewise, no one should be denied their religious liberties on the grounds that they exercise them elsewhere.

This Court has been very clear that the government substantially burdens someone's religious beliefs if the government forces the person to choose between earning their livelihood and obeying the dictates of their faith. This Court defined "burden" under the Free Exercise Clause to be:

> forcing her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand.

Sherbert v. Verner, 374 U.S. 398, 404 (1963), quoted in *Hobbie v. Unemployment Appeals Commission,* 480 U.S. 136, 140 (1987). Similarly,

> Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists.

Thomas, 450 U.S. at 717-18.

The burden on Mrs. Smith's religious beliefs is much greater than mere denial of state benefits. The Commission's decision forced Mrs. Smith to choose among three harsh choices, each of which substantially burdened her rights:

> - violate her religious beliefs by renting to an unmarried cohabiting couple; or
>
> - refuse to rent to the unmarried couple and suffer punishment inflicted by the state;
>
> - stop renting her town houses, give up her livelihood, leave her chosen occupation and surrender her property rights to earn income.

Any of these options substantially burden Mrs. Smith's religious exercise and places "substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Thomas,* 450 U.S. at 718. The state-imposed dilemma on Mrs. Smith "puts the same kind of burden upon the free

exercise of religion as would a fine against her for ... [religious] worship." *Sherbert v. Verner,* 374 U.S. 398, 404 (1963) (emphasis added).

This is not a case in which the government's rules merely make Mrs. Smith's exercise of religion more expensive, as they did to the Orthodox Jews in *Braunfeld v. Brown,* 366 U.S. 599 (1961) and Jimmy Swaggart in *Jimmy Swaggart Ministries v. California Bd. of Equalization* , 493 U.S. 378 (1990). Those cases do not apply here, as Justice Kennard stated in dissent, because "none of them involved a government rule requiring an individual to act contrary to his or her religious beliefs in order to conduct the activity in question, and none of them presented a conflict between religious belief and secular command that could only be resolved by abandoning the activity in question." App. 87a. In other words, the Orthodox Jews in *Braunfeld* were free to close their stores on Saturdays, although the secular law also required them to close on Sundays. Jimmy Swaggart was free to sell Bibles at his crusades in California; he simply had to pay state sales tax, too. Mrs. Smith cannot act on her beliefs (refuse to rent to cohabiting couples). The legal requirement directly prohibits her religious exercise. The state's burden on Mrs. Smith's religious exercise is substantial.

B. This Court Has Ruled That Governmental Prosecution and Punishment Are Obvious Examples of a Substantial Burden on One's Free Exercise Rights.

The California Supreme Court failed to understand that this Court has ruled that government *prosecution* and *punishment* are obvious examples of a substantial burden on a person's religious exercise. If withholding of governmental benefits constitutes a burden of one's rights under the First Amendment

and RFRA, how much more do governmental prosecution, conviction and imposition of penalties constitute a burden.

This Court has repeatedly found that when the government prosecutes someone for exercising a First Amendment right, the government has burdened that person's constitutional rights. For example, in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), the Amish parents who would not send their children to public schools beyond the 8th grade were "charged, tried, and convicted of violating the compulsory-attendance law in Green Country Court." 406 U.S. at 208. This Court found those actions to burden their free exercise rights because: "Wisconsin law affirmatively compels them, *under threat of criminal sanction*, to perform acts undeniably at odds with fundamental tenets of their religious beliefs." 406 U.S. at 218 (emphasis added). Congress specifically referred to *Wisconsin v. Yoder* as a case to interpret RFRA when it said that the purpose of RFRA is "to restore the compelling state interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972)." *See RFRA*, 42 U.S.C. §2000bb(b). Congress intended for a *Yoder*-like prosecution to constitute a substantial burden under RFRA.

The California Supreme Court ignores this obvious point with its discussion of Mrs. Smith's ability to sell her town homes and to permanently abandon her occupation. Therefore, this Court should grant review of this case and reaffirm that government prosecution and punishment of someone to the magnitude that Mrs. Smith has been prosecuted and punished is a substantial burden on their rights under RFRA and the Free Exercise Clause, if they have acted based on their religious convictions.

II.

THIS COURT SHOULD GRANT REVIEW BECAUSE THE CALIFORNIA SUPREME COURT'S DECISION GREATLY ADDS TO THE CONFUSION IN THE LOWER COURTS OVER WHAT IS A BURDEN UNDER THE FREE EXERCISE CLAUSE AND RFRA

A. This Decision Conflicts with Decisions by the Massachusetts, Alaska and Minnesota Supreme Courts.

This Court should grant review of this case to resolve the conflict with decisions in similar landlord cases decided by the supreme courts of Massachusetts, Alaska and Minnesota. These three courts agreed that the state had burdened the landlords' religious liberties by prosecuting them for marital status discrimination, and all of those courts said that the religious liberty issue must be resolved by determining whether there is a compelling state interest. No other state appellate court has decided a landlord case by ruling that the landlords' constitutional rights were not burdened by a governmental prosecution.

Although these state supreme courts interpreted their state constitutions' free exercise clauses in these landlord cases, they all used the compelling state interest test used in RFRA. Justice Clarence Thomas stated that "[t]here is no doubt that these decisions applied the *Sherbert-Yoder* test adopted by RFRA." *Swanner v. Anchorage Equal Rights Commission*, 130 L.Ed.2d 368, 370, n.2 (1994) (dissent from denial of cert.).

In *Attorney General v. Desilets*, 418 Mass. 316, 636 N.E.2d 233 (1994), two brothers who were devout Roman Catholics refused to rent one of their four apartments to an unmarried

couple because of their religious beliefs against facilitating sex outside of marriage on their property. The Attorney General of Massachusetts prosecuted the Desilets brothers for violating the state law prohibiting marital status discrimination in housing.

The Massachusetts Supreme Judicial Court had no problem finding that the state's prosecution of the landlords created a substantial burden on their religious liberties:

> Here ..., the government has placed a burden on the defendants that makes their exercise of religion more difficult and more costly. The statute affirmatively obliges the defendants to enter into a contract contrary to their religious beliefs and provides significant sanctions for its violation.

Desilets, 418 Mass. at 324. The Massachusetts high court understood the common sense reasoning that the coercion inherent in a governmental prosecution and punishment of someone for exercising their religious liberties is a classic example of a substantial burden on their free exercise rights. The Massachusetts Supreme Judicial Court remanded the case to the trial court to see if the state could prove that cohabiting couples have suffered systematic discrimination in Massachusetts or in the particular community where the events occurred. The state then settled the case out of court with the landlords, and dismissed all charges against the Desilets.

In the second case, the Alaska Supreme Court assumed that the prosecution of a Christian landlord for marital status discrimination when he refused to rent to unmarried couples substantially burdened the landlord's free exercise rights. *Swanner v. Anchorage Equal Rights Commission,* 874 P.2d 274, 281 (Alaska 1994). The Alaska Supreme Court ruled

that the state had a compelling interest to protect the "private right of unmarried couples to not be unfairly discriminated against in housing." *Id.* at 284. That court specifically found this interest to be a compelling state interest under RFRA. *Id.*, at 280, n.9. That court would not have reached the compelling state interest question unless there was a substantial burden on the landlord's RFRA rights. Although the majority of the Alaska Supreme Court ruled against the landlord, every justice on that court found that the government had substantially burdened the landlord's rights under the compelling state interest test by prosecuting him.[1]

In the third case, six of the seven justices on the Minnesota Supreme Court, applying the compelling state interest test, agreed that the state's prosecution of an evangelical Christian landlord for refusing to rent to an unmarried couple burdened his free exercise rights. In *State by Cooper v. French,* 460 N.W.2d 2 (Minn. 1990), the Minnesota Supreme Court ruled 4-3 in favor of the Christian landlord on the grounds that the state statutory prohibition on "marital status" discrimination did not apply to unmarried couples. Six of the seven justices addressed the landlord's free exercise defense, and they deadlocked 3-3.

All six Minnesota Supreme Court justices agreed that the state prosecution of the landlord burdened his free exercise of

---

[1] This Court's denial of certiorari in *Swanner* in no way suggests that this case is not deserving of review. The RFRA claim in *Swanner* was presented only on a petition for rehearing to the state supreme court, and that court disposed of the RFRA issue summarily in a footnote. *See Swanner*, 874 P.2d at 280, n.9. In addition, the Alaska Supreme Court's decision does not have the widespread impact of the California Supreme Court's decision, which makes RFRA inaccessible to most people in California by setting the burden requirement so unattainably high.

religion, but they divided evenly on whether the government had a compelling state interest to justify the burden on the landlord's rights. For all six justices, there was no dispute that the state's prosecution met the burden requirement under the compelling state interest test. *Id.*, at 10 and 14-15.

This Court should review the California Supreme Court's decision, because it improperly resolved the case by holding that prosecuting the landlord and driving her out of business was not a substantial burden. Three other state supreme courts have addressed that issue, and the California Supreme Court's decision conflicts with all three of them. This case should be resolved on the issue of whether there is a compelling state interest, not on the question of substantial burden issue as the California Supreme Court did.

B. Federal Appeals Courts Use Multiple and Conflicting Tests To Determine What is a Substantial Burden Under RFRA.

Federal courts have suggested a variety of conflicting ways to define "substantial burden" under RFRA. At least eight federal appeals courts have defined four different standards, as Chief Judge William Posner described in a decision that came down six days before the California Supreme Court's decision in this case, *Mack v. O'Leary*, 80 F.3d 1175 (7th Cir. 1996). Chief Judge Richard Posner wrote for a unanimous panel. He described this confusion among the circuit courts over the definition of "substantial burden" under RFRA, and then added a new definition as the RFRA standard for the Seventh Circuit.

In summary, Chief Judge Posner identified two factors that divide the various circuits when it comes to defining "substantial burden" under RFRA. The first is whether RFRA protects religiously-*motivated* conduct as well as conduct

compelled by one's religion. The second dispute among the circuit courts is whether RFRA requires the religious beliefs at issue to be "central" to the person's religion. The circuits have ruled various ways on both issues. *See Mack*, 80 F.3d at 1178.

The Fifth Circuit surveyed many of these same standards on substantial burden and concluded that RFRA's "statutory contours are vague and its legal limits and standards have yet to be defined." *Hicks v. Garner*, 69 F.2d 22, 26 (5th Cir. 1995).

This Court need not decide a comprehensive definition of "substantial burden" under RFRA to resolve Mrs. Smith's case and to find that the judgment below is in error. The California Supreme Court's decision is far out of line with the debate among the courts elsewhere. Its extreme holding nullifies most applications of RFRA in the nation's largest state.

In Mrs. Smith's case, there is no dispute that her conduct is compelled by her religious faith and central to her beliefs. She believes that God will deny her eternal salvation if she knowingly rents to couples that will have sex outside of marriage in her rental housing. App. 197a. The California Supreme Court has held that even such central and compulsory religious conduct is unprotected if the believer can avoid the conflict with state law by selling her property and permanently changing her occupation. This extreme rule trivializes RFRA and the Free Exercise Clause, because few people, if any, could ever meet such a high standard to gain protection for their religious exercise. This decision requires review by this Court.

III.

THIS COURT SHOULD ACCEPT THIS CASE TO DETERMINE WHETHER CALIFORNIA HAS A "COMPELLING STATE INTEREST" TO JUSTIFY ITS SUBSTANTIAL BURDEN ON MRS. SMITH'S RIGHTS

This Court should grant review on the question of whether California has a compelling state interest to justify its substantial burden on Mrs. Smith's religious liberty rights in this case. Although the majority of the California Supreme Court justices sidestepped the compelling state interest question, this Court should decide that issue and not remand it to the lower court. The compelling state interest issue in this case has been thoroughly addressed by both sides at every level of the proceedings. The California Court of Appeal thoroughly examined the issue and found that the state lacked a compelling state interest in this case. App. 172a-178a. All parties fully briefed the compelling state interest issue at the California Supreme Court, but that court refused to rule on it.

The compelling state interest issue in this case is a question of law, so there is no reason to remand it back to the California Supreme Court. A remand on this point would not result in judicial economy but only in unnecessary delay in resolving this case which has been going on since early 1988.

For reasons clearly stated by the California Court of Appeal, California has no compelling interest here under this Court's precedents. California law does not plausibly assert a compelling interest in protecting the right of unmarried couples to live together in a sexual relationship.

To the contrary, the California Supreme Court said in

another case, "[w]e reaffirm our recognition of a strong public policy favoring marriage [citation omitted]. No similar public policy favors the maintenance of nonmarital relationships." *Norman v. Unemployment Insurance Appeals Board,* 34 Cal.3d 1, 9, 192 Cal.Rptr. 134, 663 P.2d 904 (1983). California law routinely refuses to grant unmarried couples the same rights and privileges as it grants married couples in areas of law dealing with torts, insurance, evidence, property, family law and inheritance. *See* App. 139a-140a.

This policy against unmarried cohabitation extends to housing the state controls. The very statute at issue in this case expressly authorizes all public and private colleges and universities to exclude unmarried couples from campus housing, by allowing them to maintain housing for married couples only, and single-sex housing. California Government Code §12995 (2). Also, the California Supreme Court has upheld a state prison policy allowing conjugal visits for married couples, but not for unmarried couples. *In re Cummings,* 30 Cal.3d 870, 180 Cal.Rptr. 826, 640 P.2d 1101 (1982)

"This law has every appearance of a prohibition that society is prepared to impose upon [landlords] but not upon itself. Such a prohibition does not protect an interest 'of the highest order.'" *Florida Star v. B.J.F.*, 491 U.S. 524, 542 (1989) (Scalia, J., concurring). One thing that is settled in this Court's rulings on compelling state interests, it is that an interest that the state pursues in some contexts and not in others, leaving "appreciable damage to that supposedly vital interest unprohibited," is not a compelling state interest. *Church of the Lukumi Babalu Aye, Inc., v. City of Hialeah*, 508 U.S. 520, 547 (1993), quoting *Florida Star*, 491 U.S. at 541-42 (Scalia, J., concurring). To similar effect, *see Simon v. Schuster, Inc., v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 119-120 (1991); *Minneapolis Star & Tribune Co. v. Minnesota*

Commissioner of Revenue, 460 U.S. 575, 585-90 (1983); *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 104-05 (1979).

The California Supreme Court in effect did address the compelling state interest question by ruling that Mrs. Smith could not prevail because her religious exemption would affect the rights of third parties. App. 32a-33a. Although the California Supreme Court addressed this issue in the context of the substantial burden issue, *(id.)*, the effect on third parties is actually a question of the state's compelling interest. As Justice Kennard wrote, the issue of whether protecting Mrs. Smith's rights might have an impact on third parties has nothing to do with whether Mrs. Smith has been burdened by the state's actions, but is a factor weighed when determining whether a compelling state interest exists. App. 83a-84a.

The state supreme courts of Massachusetts, Alaska and Minnesota have addressed the compelling state interest issue in these landlord cases. The Massachusetts Supreme Judicial Court defined the state interest narrowly as "eliminating housing discrimination against cohabiting couples," *Desilets*, 418 Mass. at 330. The Alaska Supreme Court opted for a more general compelling state interest of "combating discrimination," *Swanner*, 874 P.2d at 280, n.9. The Minnesota Supreme Court evenly divided on this point, with three justices saying the state interest was "promoting access to housing for cohabiting couples," *French*, 460 N.W.2d at 10 and three other justices saying there was a compelling state interest in "eradicating invidious discrimination." *Id.* at 16.

This Court has said that "only those interests of the highest order .. can overbalance legitimate claims to free exercise of religion." *Wisconsin v. Yoder*, 406 U.S. at 215. Justice Clarence Thomas referred to that standard in *Swanner, supra,* and stated that he was "skeptical that Alaska's purported

interest in preventing discrimination on the basis of marital status is 'compelling' enough to satisfy these stringent standards." *Swanner*, 130 L.Ed.2d at 369.

This Court should grant review on the question of whether the State of California has a compelling state interest in protecting the ability of unmarried couples to find housing for their sexual relations.

IV.

MRS. SMITH STATES CLAIMS UNDER THE FREE EXERCISE CLAUSE

Mrs. Smith's claims under the Free Exercise Clause should be examined under the compelling state interest test. *Employment Division v. Smith*, 494 U.S. 872, 878-880 stated that neutral laws of general applicability cannot be challenged under the Free Exercise Clause. However, the fair housing statute at issue in this case is not a law of general applicability. That law allows all state-run and private colleges and universities to exclude unmarried couples in the same way Mrs. Smith does. *See* App. 176a-177a. Because the fair housing statute is not one of general applicability, the state must defend its law under the compelling state interest test.

Mrs. Smith also raises "hybrid" claims under *Employment Division v. Smith,* 494 U.S. 872, 881 (1990), which triggers review under the compelling state interest test. The California Court of Appeal found that Mrs. Smith stated a claim of free exercise plus freedom of speech, because the state is coercing her to post signs she would not post on her own. The Court of Appeal relied on *Wooley v. Maynard*, 430 U.S. 705 (1977) and other decisions of this Court for that ruling. App. 165a-171a.

Mrs. Smith also states a hybrid claim of free exercise plus property rights under the Takings Clause and the Fourteenth Amendment. The California Supreme Court has put this hybrid right clearly at issue with its ruling that Mrs. Smith must either violate her religious beliefs or sell her rental property.

There are at least two ways governmental action can effect a taking of property -- a physical intrusion, *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1015 (1992) or action that deprives the owner of economically viable use of the land. *Id.* at 1016. Here the state does both. First, the state commands a physical intrusion. The fair housing commission ordered Mrs. Smith to "cease and desist" her marital status discrimination, thereby forcing Mrs. Smith to allow people to occupy her town homes that she would not absent government coercion. This compelled physical intrusion violates her right to exclude others from her property. *See Dolan v. City of Tigard,* 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994).

Second, there is a regulatory taking under *Lucas*. The California Supreme Court's solution is for Mrs. Smith to sell her rental units. By doing so, Mrs. Smith can no longer earn income by renting them. Therefore, the California Supreme Court's ruling "denies [Mrs. Smith] economically viable use of [her] land." *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1015 (1992). The California Supreme Court forces Mrs. Smith to choose between fidelity to her religious beliefs or exercising her rights as an owner to earn income from her property. Therefore, this case presents a hybrid claim of free exercise of religion plus property rights.

CONCLUSION

For these reasons, petitioner Evelyn Smith asks this Court to grant the petition for writ of certiorari.

Respectfully submitted,

WENDELL R. BIRD
BIRD & MYERS
1150 Monarch Plaza
3414 Peachtree Rd. NE
Atlanta, Georgia 30326
(404) 264-9400

JORDAN W. LORENCE*
CIMRON CAMPBELL
JANE E. HADRO
MARK N. TROOBNICK
Box 2074
Fairfax, Virginia 22031
(703) 359-8619
*Counsel of Record

July 5, 1996

IN THE SUPREME COURT OF CALIFORNIA

EVELYN SMITH, Petitioner,

v.

FAIR EMPLOYMENT AND HOUSING COMMISSION, Respondent; KENNETH C. PHILLIPS, and GAIL RANDALL, Real Parties in Interest.

No. S040653
In the Supreme Court of California

Ct. App. No. C007654
Third Appellate District

Butte County Superior Court

COUNSEL

Jordan W. Lorence, Cimron Campbell, Jane E. Hadro, Wendell R. Bird, Mark N. Troobnick and Jay Alan Sekulow for Petitioner.

Loy Watkins, John G. Tulio, Alan J. Reinach, Boothby & Yingst, Lee Boothby, Oliver Thomas, Marc D. Stern, Jaffe, Trutanich, Scatena & Blum, Fred Blum, Proskauer, Rose, Getz & Mendelsohn, Jeffrey A. Berman, Steven G. Drapkin and Lee W. Rierson as Amici Curiae on behalf of Petitioner.

John K. Van de Kamp and Daniel E. Lungren, Attorneys General, Andrea Sheridan Ordin, Chief Assistant Attorney General, Carole R. Kornblum, Assistant Attorney General, Manuel M. Medeiros, Louis Verdugo, Jr., and Kathleen W. Mikkelson, Deputy Attorneys General, Steven C. Owyang,

Prudence Kay Poppink, Eisen & Johnston Law Corporation, Jay-Allen Eisen, Marian M. Johnston and Ann Perrin Farina for Respondent.

Arlo Smith, District Attorney (San Francisco), David C. Moon, Assistant District Attorney, Steven K. Green, Edward Tabash, John Beattie, Greenberg, Glusker, Fields, Claman & Machtinger and Roger L. Funk as Amici Curiae on behalf of Respondent.

David Link and Thomas F. Coleman for Real Parties in Interest.

James K. Hahn, City Attorney (Los Angeles), Charles I. Goldenberg, Assistant City Attorney, and Maria Perez Manning, Deputy City Attorney, as Amici Curiae on behalf of Real Parties in Interest.

Marsha Jones Moutrie, City Attorney (Santa Monica), Joseph Lawrence, Assistant City Attorney, Martin T. Tachiki, Barry A. Rosenbaum and Kimery A. Shelton, Deputy City Attorneys, Jon W. Davidson, Carol A. Sobel, Paul L. Hoffman, Mark D. Rosenbaum, Matthew A. Coles, Margaret C. Crosby, Tzivia Schwartz, Barbara H. Bergen, Margalynne Armstrong, James D. Smith, Ameila A. Craig, Wilson, Sonsini, Goodrich & Rosati and Clyde J. Wadswoth as Amici Curiae on behalf of Respondent and Real Parties in Interest.

Filed April 9, 1996

WERDEGAR, J.:

The California Fair Employment and Housing Act (Gov. Code, §12900 et seq.) (FEHA) declares it to be "unlawful [¶] . . . [f]or the owner of any housing accommodation to

discriminate against any person because of the . . . marital status . . . of that person" (*id.* § 12955, subd. (a)). The Fair Employment and Housing Commission (commission) ruled that a landlord violated the statute by refusing to rent an apartment to an unmarried couple. The Court of Appeal reversed, believing the state may not constitutionally apply FEHA to a landlord whose religious beliefs make it sinful to rent to an unmarried couple. We reverse the decision of the Court of Appeal.

I. FACTS

The relevant facts set out below are as found by the commission in its final decision.

"Respondent [Evelyn Smith] owns and leases four rental units located [in two duplexes] at 675, 677, 683 and 685 Eastwood Avenue, Chico, California. They are operated exclusively for business and commercial purposes, with income generated from the rentals reported as business income. The business is not organized or classified as a religious, charitable or other nonprofit concern. Respondent does not reside in any of the four units and visits the units occasionally to maintain them.

"When a vacancy occurs in one of the units, the unit is advertised for rent in local newspapers and is otherwise available to the general public. When prospective tenants inquire about a vacant unit, respondent tells them she prefers married couples. She prefers married couples because, for religious reasons, she opposes sex outside of marriage. However, since she has received so many calls from unmarried couples seeking to rent her units, she simply tells prospective tenants that she prefers to rent to married couples.

"Respondent is a Christian. She is a member of Bidwell Presbyterian Church in Chico and has attended there for approximately 25 years. Respondent believes that sex outside of marriage is sinful, and that it is a sin for her to rent her units to people who will engage in nonmarital sex on her property. Respondent believes that God will judge her if she permits people to engage in sex outside of marriage in her rental units and that if she does so, she will be prevented from meeting her deceased husband in the hereafter.

"Respondent has rented her units to single, divorced and widowed persons. Respondent has no religious objection to renting to people who are single, divorced, widowed or married. Respondent would not rent to anyone who engages in sex outside of marriage, whether they are single, divorced, widowed or married. Respondent rents her units to people without regard to their race, color, national origin, ancestry, or physical handicap. Respondent rents her units without regard to the religious beliefs of tenants. She does not know the religious background of most of her tenants because she never asks them and only knows if they volunteer the information. Respondent has rented her units to males and females and does not discriminate on the basis of sex.

"From on or about March 29, 1987, to April 13, 1987, respondent advertised the availability of one of her units in the Chico *Enterprise Record*. Complainants [real parties in interest Gail Randall and Kenneth Phillips] saw the advertisement on April 1, 1987, and drove by the unit that night. Because of the particular location, attractive architecture, convenient location and well maintained premises, complainants took a special interest in the unit and the next morning called respondent and arranged to see it. During this telephone conversation respondent stated that she preferred to rent to married couples.

"On or about April 2, 1987, complainants met with respondent and were shown the premises, which they liked very much. Respondent told complainants that she would not rent to unmarried couples, and she asked complainants how long they had been married. Complainant Phillips falsely represented to respondent that he and complainant Randall were married. Complainants made no commitment to rent at that time and filled out an informal application for respondent. Complainant Randall signed her name, 'Gail Phillips' on that document.

"Later, complainants called respondent and told respondent they were interested in renting the unit. They met with respondent on or about April 7, 1987. A lease agreement was executed between the parties on that date for the unit located at 677 Eastwood Avenue. It was for a month-to-month tenancy commencing May 1, 1987 at a rent of $325 per month. Complainants also paid respondent a security deposit of $150 for which a receipt was given. Complainant Randall signed the lease agreement, 'Gail Phillips'. During this meeting respondent told complainants again that she would not rent to unmarried couples.

"Later in the day on April 7, 1987, complainant Randall called respondent and asked if respondent doubted that Randall and Phillips were married. Randall asked respondent if she wanted to see their marriage license. Respondent said, 'No.' Still later on the same day, complainant Phillips called respondent and told her that he and Randall were not married. Respondent told him that she could not rent to an unmarried cohabiting couple because that would violate her religious beliefs. Respondent said that she would return their deposit. She sent them a check for $150."

Randall and Phillips filed separate complaints against Smith with the commission. Based on the complaints, the

commission issued two accusations. As subsequently amended, the accusations alleged Smith had violated Government Code section 12955, subdivisions (a), (b), (c) and (d),[1] Civil Code section 51 (the Unruh Civil Rights Act),[2] and Government

---

[1] Government Code section 12955 provides in relevant part:

"It shall be unlawful:

"(a) For the owner of any housing accommodation to discriminate against any person because of the race, color, religion, sex, marital status, national origin, ancestry, familial status, or disability of that person.

"(b) For the owner of any housing accommodation to make or to cause to be made any written or oral inquiry concerning the race, color, religion, sex, marital status, national origin, ancestry, familial status, or disability of any person seeking to purchase, rent or lease any housing accommodation.

"(c) For any person to make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a housing accommodation that indicates any preference, limitation, or discrimination based on race, color, religion, sex, marital status, national origin, ancestry, familial status, or disability or an intention to make any such preference, limitation, or discrimination.

"(d) For any person subject to the provisions of Section 51 of the Civil Code, as that section applies to housing accommodations, to discriminate against any person on the basis of sex, color, race, religion, ancestry, national origin, familial status, marital status, disability, or on any other basis prohibited by that section."

[2] As relevant here, the Unruh Civil Rights Act provides: "[a]ll persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, or disability are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever."

Code section 12948.[3]

A hearing before an administrative law judge ensued. Smith defended the accusations on two grounds that are relevant here: first, the relevant provisions of FEHA (Gov. Code, § 12955, subd. (a)) and the Unruh Civil Rights Act (Civ. Code, § 51) do not prohibit discrimination against unmarried couples; second, to require her to rent to an unmarried couple over her religious objections would violate the free exercise clauses of the federal and state Constitutions. (U.S. Const., 1st Amend.; Cal. Const., art. I, § 4.) The judge rejected both arguments and issued a proposed decision in favor of Randall and Phillips.

The commission subsequently exercised its power not to adopt the proposed decision and to hear the case itself on the existing record. (Gov. Code, § 11517, subd. (c).) After additional briefing, the commission issued its decision in favor of Randall and Phillips. In its decision, the commission found that Smith had violated Government Code sections 12955, subdivisions (a) and (d), Civil Code section 51, and Government Code section 12948. More particularly, the commission decided that FEHA's prohibition of discrimination based on "marital status" did encompass discrimination against unmarried couples, and that the Unruh Civil Rights Act prohibited all forms of arbitrary discrimination by business establishments, including discrimination against unmarried couples. The commission concluded it had no power to address Smith's constitutional arguments in view of article III, section

---

[3] Government Code section 12948 provides: "It shall be an unlawful practice under this part [i.e., FEHA] to deny or to aid, incite, or conspire in the denial of the rights created by Section 51 or 51.7 of the Civil Code."

3.5, of the California Constitution.[4] As relief, the commission ordered Smith to cease and desist from discriminating on the basis of marital status; to post and give to prospective tenants various notices setting out the provisions of FEHA, the outcome of this case, and the statement that Smith practices equal housing opportunity; and to pay Randall and Phillips a total of $454 in compensatory damages and $500 in damages for emotional distress.[5] The commission dismissed the remaining claims as untimely.

Smith sought review of the commission's decision by petition for writ of mandate. (See Code Civ. Proc., § 1094.5.) The Court of Appeal reversed. The court held the state could not prevent Smith from discriminating against unmarried couples, in view of the free exercise clauses of the federal and state Constitutions (U.S. Const., 1st Amend.; Cal. Const., art. I, § 4) and the Religious Freedom Restoration Act of 1993 (42 U.S.C. § 2000bb et seq.). The court also concluded that Smith's inquiry into her tenants' marital status did not violate their right

---

[4] California Constitution, article III, section 3.5, provides in relevant part:

"An administrative agency, including an administrative agency created by the Constitution or an initiative statute, has no power: [¶] (a) To declare a statute unenforceable, or refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional . . . ."

[5] We subsequently held the commission had no power to award damages for emotional distress. (*Walnut Creek Manor v. Fair Employment & Housing Com.* (1991) 54 Cal.3d 245, 265.) Accordingly, this portion of the commission's award must be vacated.

to privacy under the state Constitution. (Cal. Const., art. I, §1.)[6] The court did not address Smith's argument that FEHA (Gov. Code, § 12955, subd. (a)) and the Unruh Civil Rights Act (Civ. Code, § 51; see also Gov. Code, § 12948) do not prohibit discrimination against unmarried couples.

We granted review.

I. DISCUSSION

A. Does FEHA Prohibit Housing Discrimination Against Unmarried Couples?

In FEHA, the Legislature declared it "unlawful [¶] . . . [f]or the owner of any housing accommodation to discriminate against any person because of the . . . marital status . . . of that person" (Gov. Code, § 12955, subd. (a)) or "to cause to be made any written or oral inquiry concerning the . . . marital status . . . of any person seeking to . . . rent or lease any housing accommodation" (*id.*, subd. (b)). The commission found Smith violated FEHA by refusing to rent to Randall and Phillips upon learning they were not married.

Smith argues "the statutory ban on marital status discrimination does not include [unmarried] cohabiting couples."

---

[6] In this court, rather than asserting distinct claims under the state Constitution's privacy clause (Cal. Const., art. I, section 1), Randall, Phillips, and the commission argue that the right to privacy is one of several compelling interests, embodied in FEHA, that justify the law's application to Smith over her religious objections. (See *post,* fn. 21.) Our conclusion makes it unnecessary to address the argument.

The argument lacks merit. To determine what a statute means, "we first consult the words themselves, giving them their usual and ordinary meaning." (*DaFonte v. Up-Right, Inc.* (1992) 2 Cal.4th 593, 601.) The usual and ordinary meaning of the words "marital status," as applied to two prospective tenants,[7] is that a landlord may not ask them whether they are married or refuse to rent to them because they are, or are not. Smith asked whether Randall and Phillips were married and refused to rent to them because they were not. The conclusion that she thereby violated FEHA seems unavoidable.[8]

Various amici curie argue that Smith's refusal to rent to Randall and Phillips does not violate FEHA because it was based on Smith's assumptions about their sexual conduct rather than their marital status. The high courts of Alaska and Massachusetts recently rejected similar arguments. (*Swanner v. Anchorage Equal Rights Com'n* (Alaska 1994) 874 P.2d 274, 278, fn. 4 [interpreting Alaska Stat. § 18.80.240]; *Attorney General v. Desilets* (1994) 418 Mass. 316, 320 [636 N.E.2d 233, 235] [interpreting Mass. Gen. L., ch. 151B, § 4(6)].) Interpreting a statute analogous to FEHA, the court in Swanner,

---

[7] As used in FEHA, the term "'[p]erson' includes one or more individuals . . . ." (Gov. Code, section 12925, subd. (d).)

[8] There are two exceptions to Government Code section 12955 that might conceivably relate to a case such as this. FEHA does not forbid a property owner to refuse "to rent or lease a portion of an owner-occupied single-family house to a person as a roomer or boarder living within the household . . . ." (Gov. Code, § 12927, subd. (c)(2)(A).) Nor does FEHA prohibit "a religious organization . . . from limiting the sale, rental, or occupancy of dwellings that it owns or operates for other than a commercial purpose to persons of the same religion or from giving preference to those persons . . . ." (Gov. Code, § 12955.4.) Smith does not contend that either exception applies to her rental properties.

supra, explained its conclusion in this way: a landlord "cannot reasonably claim that he does not rent or show property to cohabiting couples based on their conduct (living together outside of marriage) and not their marital status when their marital status (unmarried) is what makes their conduct immoral in his opinion." (*Swanner v. Anchorage Equal Rights Com'n,* supra, 874 P.2d at p. 278, fn. 4.) The opinion of the Supreme Judicial Court of Massachusetts in *Attorney General v. Desilets, supra,* is to the same effect.[9]

Smith argued before the commission, and various amici curiae argue here, that Government Code section 12955 can be read as protecting single, married, widowed, and divorced *individuals* rather than unmarried *couples.* However, to acknowledge the statute protects the former, as it undoubtedly does, in no way tends to show it does not also protect the latter. The statutory language banning discrimination based on "marital status" naturally carries both meanings.

Our own Legislature's use of the words "marital status" in other statutes confirms this. Where the Legislature has, in some particular context, wished to treat married and unmarried couples identically, it has chosen to convey that idea by requiring equal treatment regardless of "marital status." In Family Code section 7602, for example, the Legislature

---

[9] "[A]nalysis of the [defendant landlords'] concerns shows that it is marital status and not sexual intercourse that lies at the heart of the defendants' objection. If married couple A wanted to cohabit in an apartment owned by the defendants, they would have no objection. If unmarried couple B wanted to cohabit in an apartment owned by the defendants, they would have great objection. *The controlling and discriminating difference between the two situations is the difference in the marital status of the two couples.*" (*Attorney General v. Desilets, supra,* 418 Mass. at p. 320 [636 N.E.2d at p. 235], italics added.)

declared that "[t]he parent and child relationship extends equally to every child and to every parent, *regardless of the marital status of the parents.*" (Italics added.) In Family Code section 1830, the Legislature gave jurisdiction to the family conciliation court over child custody controversies "between parents *regardless of their marital status* . . . ." (Italics added.) In Probate Code section 6450, subdivision (a), the Legislature declared, for purposes of determining intestate succession, that "[t]he relationship of parent and child exists between a person and the person's natural parents, *regardless of the marital status* of the natural parents." (Italics added.)

The commission has interpreted Government Code section 12955 to protect unmarried couples since 1980, when FEHA was enacted. (See *Dept. of Fair Empl. & Hous. v. Smith* (1989) FEHC Dec. No. 89-11, at pp. 5-6, revd. on other grounds *Smith v. Fair Employment & Housing* (Cal.App.); *Dept. of Fair Empl. & Hous. v. Donahue* (1989) FEHC Dec. No. 89-10, at pp. 4-5, revd. on other grounds *Donahue v. Fair Employment and Housing Com.***[FOOTNOTE* -- see end of decision]** (Cal.App.); *Dept. of Fair Empl. & Hous. v. Andrews* (1984) FEHC Dec. No. 84-14, pp. 4-5; *Dept. of Fair Empl. & Hous. v. Helfrich* (1981) FEHC Dec. No. 81-08, at pp. 5-6; *Dept. of Fair Empl. & Hous. v. Bequette* (1980) FEHC Dec. No. 80-29, pp. 3-5; *Dept. of Fair Empl. & Hous. v. Hess* (1980) No. 80-10, FEHC Precedential Decs. 1980-81, CEB 3, p. 2.)

Final responsibility for interpreting the law rests with the courts rather than with administrative agencies. (*Whitcomb Hotel, Inc. v. Cal. Emp. Com.* (1944) 24 Cal.2d 753, 757.) Still, the commission's interpretation of FEHA is entitled to consideration because the commission is the agency charged with the statute's administration. (Gov. Code, § 12930.) It has been said the responsible agency's interpretation is entitled to "great weight" when, as here, it is substantially

contemporaneous with the statute's enactment. This is because such interpretations "'are highly relevant and material evidence of the probable general understanding of the times and of the opinions of men [and women] who probably were active in the drafting of the statute.'" (*Whitcomb Hotel, Inc. v. Cal. Emp. Com., supra,* 24 Cal.2d at pp. 756-757, quoting *White v. Winchester Country Club* (1942) 315 U.S. 32, 41; see also *Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1388.) The commission first interpreted section 12955 to bar discrimination against unmarried persons less than two months after the Governor signed it into law. (See *Dept. of Fair Empl. & Hous. v. Bequette, supra*, FEHC Dec. No. 80-29, pp. 3-5 [dated Nov. 6, 1980]; and Stats. 1980, ch. 992, § 2, p. 3154 [reflecting Governor's approval on Sept. 19, 1980]). The weight due to the responsible agency's interpretation of a statute increases when, as here, the agency's interpretation is uniform and of long standing. (*Whitcomb Hotel v. Cal. Emp. Com., supra,* 24 Cal.2d at p. 757; see also *Hoyt v. Board of Civil Service Commrs.* (1942) 21 Cal.2d 399, 402; *Los Angeles v. Superior Court* (1941) 17 Cal.2d 707, 712.)

Nothing in the legislative history of Government Code section 12955 contradicts the established interpretation. If the history sheds any light on the matter, it tends to support that interpretation.

The language prohibiting discrimination in housing accommodations "because of . . . marital status" derives from the Rumford Fair Housing Act of 1963 (former Health & Saf. Code, § 35720), which FEHA superseded. As originally enacted, the Rumford Act did not refer to "marital status." (Stats. 1963, ch. 1853, § 2, p. 3824.) The Legislature added those words in 1975. (Stats. 1975, ch. 1189, § 3, pp. 2943-2944.)

While the 1975 amendment was under consideration, representatives of the Attorney General's Office advised the Legislature in hearings that one of its effects would be to override prior law (Bus. & Prof. Code, § 125.6), which the Attorney General had interpreted as permitting licensed realtors acting as property managers to select tenants "on the basis of a blood or marital relationship between the prospective occupants or a lack of such relationship . . . ." (Letter from Attorney General to Assemblyman Dixon, dated Aug. 26, 1974, quoted in 9 Assem. J. (1973-1974 Reg. Sess.) p. 17400.)

That the Legislature understood the 1975 amendment would protect unmarried cohabitants can also be inferred from the text of the amendment. An exception to the amendment, which continues in FEHA (Gov. Code, § 12995, subd. (a)(2)), expressly permitted "any postsecondary educational institution" to provide "housing accommodations reserved for either male or female students . . . or . . . married students . . . ." (Former Health & Safety Code, § 35741.5, added by Stats. 1975, ch. 1189, § 6, p. 2947.) The exception had no apparent purpose unless the amendment, without the exception, would have required educational institutions to permit unmarried male and female students to live together, or prevented discrimination in favor of married students.

Soon after the Governor signed the 1975 amendment into law, the court in *Atkisson v. Kern County Housing Authority* (1976) 59 Cal.App.3d 89, 99-100, interpreted the amendment as "a general policy statement" making "unlawful" a public housing authority's policy of forbidding a tenant to live with persons of the opposite sex not related to the tenant by blood, marriage, or adoption. *Atkisson* was the only judicial interpretation of the statutory language barring housing discrimination because of "marital status" in 1980, when the Legislature decided to reuse the language in the new FEHA. It

is frequently said that "[w]hen a statute has been construed by the courts, and the Legislature thereafter reenacts that statute without changing the interpretation put on that statute by the courts, the Legislature is presumed to have been aware of, and acquiesced in, the courts' construction of that statute." (*People v. Bouzas* (1991) 53 Cal.3d 467, 475; see also *Wilkoff v. Superior Court* (1985) 38 Cal.3d 345, 353; *People v. Hallner* (1954) 43 Cal.2d 715, 719; *People v. Fox* (1977) 73 Cal.App.3d 178, 181.)

The new FEHA received the same interpretation as did the old Rumford Act. In 1982, the court in *Hess v. Fair Employment & Housing Com.* (1982) 138 Cal.App.3d 232, upheld the commission's finding that the owners of a duplex had violated Government Code section 12955 by rescinding a rental agreement with a man and a woman upon learning they were not married. The court relied on *Atkisson v. Kern County Housing Authority, supra*, 59 Cal.App.3d 89, to hold that the language of FEHA "prohibits discrimination based on marital status, including that against unmarried couples." (*Hess v. Fair Employment & Housing Com., supra*, 138 Cal.App.3d at p. 235.) In the ensuring 13 years, no court has suggested the statute should be interpreted differently.

Smith gives the question of FEHA's interpretation cursory treatment in her brief. As mentioned, she takes the position Government Code section 12955 does not protect unmarried cohabitants. Her argument consists of acknowledging that the decisions in *Hess v. Fair Employment & Housing Com., supra,* 138 Cal.App.3d 232, and *Atkisson v. Kern County Hous. Auth., supra,* 59 Cal.App.3d 89, are to the contrary, and citing without discussion opinions from other states interpreting differently statutes similar to FEHA. Smith does not cite other, more recent decisions contrary to her position. (*Attorney General v. Desilets, supra,* 418 Mass. at p.

320 [636 N.E.2d at p. 235]; *Worcester Hous. Auth. v. Massachusetts Comm'n Against Discrimination* (1989) 406 Mass. 244 [547 N.E.2d 43]; *Swanner v. Anchorage Equal Rights Com'n, supra,* 874 P.2d at p. 278; *Foreman v. Anchorage Equal Rights Com'n* (Alaska 1989) 779 P.2d 1199, 1201-1203.)

Some of the cases Smith cites are of little value for our purposes. The courts in Illinois, Minnesota, and Washington had the burden of reconciling statutes barring discrimination because of "marital status" with other statutes criminalizing private sexual conduct between consenting adults. (*Mister v. A.R.K. Partnership* (1990) 197 Ill.App.3d 105, 113-114 [553 N.E.2d 1152, 1157]; *State by Cooper v. French* (Minn. 1990) 460 N.W.2d 2, 5-6; *McFadden v. Elma Country Club* (1980) 26 Wn. App. 195, 201-202 [613 P.2d 146, 150].) We do not labor under the same burden.[10] In 1975, a few months before the Legislature amended the Rumford Act to prohibit housing discrimination because of "marital status," the Legislature repealed the laws criminalizing private, sexual conduct between consenting adults. (See Stats. 1975, ch. 71, § 7, p. 133; see generally *Note, California Consenting Adults Law: The Sex Act in Perspective* (1976) 13 San Diego L.Rev. 439.)

Smith also cites an opinion by the high court of Wisconsin, in which the court declared a county ordinance similar to FEHA "invalid to the extent that it [sought] to protect

---

[10] Were we to adopt Smith's interpretation of Government Code section 12955, however, we would need to reconcile it, if possible, with the holding that persons in this state have a constitutional right to live with others who are not related by blood, marriage, or adoption, as an aspect of the right to privacy. (*City of Santa Barbara v. Adamson* (1980) 27 Cal.3d 123, 130-137.)

'cohabitants' . . . ." (*County of Dane v. Norman* (Wis. 1993) 174 Wis.2d 683, 688 [497 N.W.2d 714, 716].) The court reasoned the county had no power to enact statutes "inconsistent with the public policy of [Wisconsin,] which seeks to promote the stability of marriage and family." (*Ibid.*) We have no analogous power to invalidate a state statute, such as Government Code section 12955, on nonconstitutional grounds. The argument is illogical in any event: One can recognize marriage as laudable, or even as favored, while still extending protection against housing discrimination to persons who do not enjoy that status.

An opinion by the high court of New York (*Hudson View Properties v. Weiss* (N.Y. 1983) 59 N.Y.2d 733 [450 N.E.2d 234; 463 N.Y.S.2d 428]) is not on point. Without expressly deciding whether or not a statute barring discrimination because of "marital status" applied to unmarried couples, the court held that "the issue arises not because the tenant is unmarried, but because the lease restricts occupancy of her apartment . . . to the tenant and the tenant's immediate family." (*Id.*, 59 N.Y.2d at p. 735 [450 N.E.2d at p. 235; 463 N.Y.S.2d at p. 429] [interpreting N.Y. Exec. Law, § 296, subd. 5(a).].) One can argue from the result that New York courts would not interpret their statute as applying to unmarried couples. But the cursory opinion offers no real assistance on the issue.

A lower court in Maryland (*Prince George's County v. Greenbelt Homes, Inc.* (1981) 49 Md.App. 314 [431 A.2d 745]) did interpret a statutory ban on "marital status" discrimination as not protecting unmarried couples. The court permitted a housing association to refuse to approve the sale of a house to an unmarried couple. The court reasoned that "neither complainant (each of whom was 'single,' 'unmarried') was denied membership individually because of his or her individual marital status. While each separately had a marital

status, collectively they did not." (*Id.*, 49 Md.App. at p. 319 [431 A.2d at pp. 747-748, italics omitted].) The Maryland court's reasoning cannot easily be applied to California law. Our Legislature, as mentioned, has used the words "marital status" to refer to the presence or absence of the marital relationship between two individuals. (E.g., Fam. Code, §§ 1830, 7602; Prob. Code, § 6450.)

Ultimately, the question must be answered as a matter of California law. In view of Government Code section 12955's language, its uniform and long-standing interpretation by the commission and the courts, and its legislative history, we conclude that FEHA does protect unmarried cohabitants against housing discrimination.[11]

B. Does Federal or State Law Require the State to Exempt Smith from FEHA to Avoid Burdening Her Religious Exercise?

Having concluded that Smith violated FEHA, we must now determine whether the state is required to exempt her from that law to avoid burdening her exercise of religious freedom. Although the question has arisen in three other states, only the Supreme Court of Alaska has decided it. That court rejected the landlord's claim to an exemption. (*Swanner v. Anchorage*

---

[11] In view of the conclusion that FEHA does prohibit discrimination against unmarried couples, there is a proper basis for the commission's decision. It is, therefore, unnecessary to decide whether the Unruh Civil Rights Act (Civ. Code, § 51; see also Gov. Code, § 12948) has the same effect. (Compare *Beaty v. Truck Ins. Exchange* (1992) 6 Cal.App.4th 1455, 1462 [declining to be the "first court" to hold that the Unruh Civil Rights Act bars discrimination based on marital status], with *Marina Point, Ltd. v. Wolfson* (1982) 30 Cal.3d 721, 736 [dictum to the contrary], and *Frantz v. Blackwell* (1987) 189 Cal.App.3d 91, 95 [same].)

Equal Rights Com'n, supra, 874 P.2d at pp. 279-280, cert. den. (1994) __ U.S. __ [115 S.Ct. 460; 130 L.Ed.2d 368].) The Supreme Judicial Court of Massachusetts found the question inappropriate for resolution by summary judgment and remanded for further evidentiary proceedings. (*Attorney General v. Desilets, supra,* 418 Mass. at pp. 320-334, 636 N.E.2d at pp. 235-243.) The Supreme Court of Minnesota, which interpreted Minnesota law as permitting discrimination against unmarried couples, for that reason did not address the landlord's claim to an exemption. (*State ex rel. Cooper v. French, supra,* 460 N.W.2d at p. 11.)

Smith's claim to an exemption implicates three areas of law: the First Amendment to the United States Constitution, the Religious Freedom Restoration Act of 1993 (42 U.S.C. § 2000bb et seq.), and article I, section 4, of the California Constitution. We consider each in turn.

1. The First Amendment.

The First Amendment does not support Smith's claim. Her religion may not permit her to rent to unmarried cohabitants, but "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" (*Employment Division v. Smith* (1990) 494 U.S. 872, 879, quoting *United States v. Lee* (1982) 455 U.S. 252, 263, fn. 3.) The statutory prohibition against discrimination because of marital status (§ 12955) is a law both generally applicable and neutral towards religion. The law is generally applicable in that it prohibits all discrimination without reference to motivation. The law is neutral in that its object is to prohibit discrimination irrespective of reason . . . not because it is undertaken for religious reasons. (See *Church*

of the Lukumi Babalu Aye, Inc. v. City of Hialeah (1993) 508 U.S. 520, ___ [113 S.Ct. 2217; 124 L.Ed.2d 472].) Consequently, section 12955 does not violate the free exercise clause as interpreted in *Employment Division v. Smith, supra.*

The foregoing principles reflect the latest evolution in the United States Supreme Court's understanding of the free exercise clause. While they bar Smith's claim under the federal Constitution to an exemption from FEHA, to assist in understanding her claims under the Religious Freedom Restoration Act and the California Constitution we review how the free exercise clause was interpreted in the past and how the high court arrived at the current understanding articulated in *Employment Division v. Smith, supra*, 494 U.S. 872.

In the earliest cases arising under the free exercise clause, the high court held that, while freedom of religious *belief* was absolutely protected, the government might regulate conduct. That a generally applicable law incidentally burdened a person's right to freely exercise his or her religion was not considered a valid objection to the law's enforcement. (E.g., *Reynolds v. United States* (1878) 98 U.S. 145, 167 [upholding application of polygamy statute to person whose religious beliefs required polygamous marriages].)

The court later came to view the distinction between belief and conduct as an insufficient basis for resolving conflicts between religious exercise and generally applicable laws. (*Wisconsin v. Yoder* (1972) 406 U.S. 205, 220 ["in this context belief and action cannot be neatly confined in logic-tight compartments"].) Thereafter, instead of simply distinguishing between belief and conduct, the court weighed the burden on religious exercise against the government's interest in applying the law. If the burden was substantial and outweighed the government's interest, the government was

required to accommodate the religiously motivated conduct by exempting it from the law.[12] If, on the other hand, the government's interest was of sufficient importance to outweigh the burden on religious exercise and could not be achieved by less restrictive means, no accommodation was required.[13] Governmental interests thought to be sufficient for these purposes were variously described as "compelling" *(Sherbert v. Verner, supra*, 374 U.S. at p. 403), "strong" (*Id.* at p. 408), "of the highest order" (*Wisconsin v. Yoder, supra*, 406 U.S. at p. 215), and "very high" (*United States v. Lee, supra*, 455 U.S. at p. 259). An accommodation was not required if the burden

---

[12] E.g., *Thomas v. Review Bd., Ind. Emp. Sec. Div.* (1981) 450 U.S. 707, 716-719 [state's interest in minimizing claims for unemployment compensation and avoiding inquiries into religious beliefs did not justify denying benefits to a person who, for religious reasons, quit his job manufacturing war materials] (*Thomas v. Review Board*); *Sherbert v. Verner* (1963) 374 U.S. 398, 406-409 [state's interest in avoiding fraudulent claims for unemployment compensation did not justify denying benefits to a person who quit his job because his religion prohibited working on Saturday]; *Wisconsin v. Yoder, supra,* 406 U.S. 205, 213-236 [state's interest in compulsory education did not justify requiring Amish parents to send their children to public school beyond the eighth grade over the parents' religious objections].

[13] E.g., *Hernandez v. Commissioner* (1989) 490 U.S. 680, 698-700 [government's interest in maintaining a sound tax system justified denying tax deductions for payments made to Church of Scientology in exchange for religious services]; *Bob Jones University v. United States* (1983) 461 U.S. 574, 602-604 [government's interest in eradicating racial discrimination outweighed any burden that denial of tax exempt status imposed on a private university practicing racial discrimination]; *United States v. Lee, supra,* 455 U.S. 252, 256-261 [interest in maintaining sound tax system justifies requiring Amish employer to pay Social Security tax for employees, despite employer's religious objection].

on religious exercise was not considered substantial.[14] This approach to cases involving generally applicable laws that incidentally burdened religious exercise . . . balancing the state's interest against the burden on free exercise . . . came to be known as the "compelling interest" test after the language used in *Sherbert v. Verner, supra*, 374 U.S. at page 404.

In 1990, in the case of *Employment Division v. Smith, supra,* 494 U.S. 872, the high court abandoned balancing as a way of adjudicating religiously motivated challenges to generally applicable laws. The case was brought by employees of a private drug rehabilitation program, who were fired from their jobs and denied state unemployment benefits because they had used the drug peyote for sacramental purposes at a ceremony of the Native American Church. The employees challenged the denial of benefits as a violation of the free exercise clause. The Oregon Supreme Court ordered the benefits reinstated. The court reasoned the state's interest in preserving the financial integrity of the unemployment compensation fund did not outweigh the burden on the plaintiffs' religious exercise. (*Smith v. Employment Div.* (1986)

---

[14] E.g., *Jimmy Swaggart Ministries v. Board of Equalization* (1990) 493 U.S. 378, 384-392 [state tax on sales of religious materials, although reducing amount of money available for religious activities, is not a constitutionally significant burden on religion]; *Tony & Susan Alamo Foundation v. Secretary of Labor* (1985) 471 U.S. 290, 303-305 [payment of minimum wage under Fair Labor Standards Act (29 U.S.C. § 201 et seq.) to religious association's employees, who object to payment on religious grounds, does not burden their religious exercise because they may simply return the money]; *Braunfeld v. Brown* (1961) 366 U.S. 599, 606 [upholding Sunday closing law's application to religious objectors because they need not forsake their religious practice, but may instead "retain[] their present occupations and incur[] economic disadvantage or engag[e] in some other economic activity which does not call for either Saturday or Sunday labor"].

301 Ore. 209, 217-219 [721 P.2d 445, 449-450].)

The United States Supreme Court reversed. Repudiating the balancing test set out in such cases as *Sherbert v. Verner, supra,* 374 U.S. 398, and *Wisconsin v. Yoder, supra*, 406 U.S. 205, the court explained: "We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate." (*Employment Division v. Smith, supra*, 494 U.S. at pp. 878-879.) The court distinguished earlier cases granting exemptions for religiously motivated conduct as involving "not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press [citations]." (*Id.* at p. 881.) To the argument that, "when otherwise prohibitable conduct is accompanied by religious convictions, not only the convictions but the conduct itself must be free from governmental regulation" (*Id.* at p. 882), the court replied: "We have never held that, and decline to do so now" (*ibid.*).

In 1993, Congress restored the "compelling interest" test as a matter of statutory law by enacting the Religious Freedom Restoration Act. (42 U.S.C. § 2000bb et seq.) We shall address the act, as well as its application to this case, in the next section of this opinion.

Employment Division v. Smith, supra, 494 U.S. 472, disposes of Smith's claim under the free exercise clause of the federal Constitution. The *Smith* opinion, however, might be read as still requiring a court to apply the "compelling interest" test when a generally applicable law burdens a so-called "hybrid right," i.e., the right of free exercise in combination with another constitutional right. (Cf. *id.* at pp. 881-882.) The argument is based on the high court's statement that past decisions creating exceptions to generally applicable laws

involved "not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections . . . ." (*Id.* at p. 881.) The remedial order issued against Smith requires her to post a sign informing prospective tenants of their rights under FEHA, among other things. This, she asserts, violates her right to freedom of speech.[15] The parties opposed to Smith's position argue the high court's discussion of hybrid rights was not intended to preserve the balancing test for any class of cases, but was, instead, merely a part of the court's explanation of why it was rejecting the assertion the First Amendment requires accommodation of religiously motivated conduct. (See *ante*, p. 20.)

We need not, and do not, consider the "hybrid rights" issue. Assuming for the sake of argument the opinion in *Employment Division v. Smith, supra*, 494 U.S. 472, does preserve the "compelling interest" test in cases involving "hybrid rights," the effect is simply to require us to apply the same test we must apply in any event under the Religious Freedom Restoration Act (42 U.S.C. § 2000bb et seq.). We turn now to the act.

2. The Religious Freedom Restoration Act.

The Religious Freedom Restoration Act (42 U.S.C. § 2000bb et seq.) (hereafter RFRA, or the act) provides that

---

[15] In its return to Smith's petition for writ of mandate, the commission offered to modify its order by eliminating the notice requirements to which Smith objected. Regardless of the notice requirements, Smith argues "hybrid rights" are involved because the state's interference with the management of her property violates rights protected by the just compensation clause of the Fifth Amendment and the due process clause of the Fourteenth Amendment.

"[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subdivision (b)." (42 U.S.C. § 2000bb-1(a).) Under subdivision (b), "[g]overnment may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person . . . [¶] (1) is in furtherance of a compelling governmental interest; and [¶] (2) is the least restrictive means of furthering that compelling governmental interest." (42 U.S.C. § 2000bb-1(b).)

RFRA applies to this case. Broadly and expressly retroactive, the act "applies to all Federal and State law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 15, 1993 [the date on which RFRA became effective]." (42 U.S.C. § 2000bb-3(a).) Smith has standing to invoke RFRA because she claims FEHA burdens her religious exercise. Under RFRA, "[a] person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government." (42 U.S.C. § 2000bb-1(c).)[16]

In applying RFRA to this case, we look to the entire body of case law interpreting the Free Exercise Clause prior to

---

[16] The parties opposed to Smith argue that RFRA cannot constitutionally be applied to enforce rights under the free exercise clause at the expense of the constitutional rights of third parties. (Cf. *Katzenbach v. Morgan* (1966) 384 U.S. 641, 651, fn. 10 [explaining that congressional power under section 5 of the 14th Amendment "is limited to adopting measures to enforce the guarantees of the Amendment; [section] 5 grants Congress no power to restrict, abrogate, or dilute these guarantees"].) The conclusion set out below . . . that RFRA does not require the state to accommodate Smith's religiously motivated housing discrimination . . . makes it unnecessary to consider her opponents' specific argument about the limits of congressional power.

Employment Division v. Smith, supra, 494 U.S. 872. That we must do so is evident from the language of the act, its legislative history, and federal judicial decisions interpreting it. In the act, Congress articulated its understanding that "the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests." (42 U.S.C. § 2000bb(a)(5).) Congress also declared its intent "to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) . . . ." (42 U.S.C. § 2000bb(b)(1).) The references to *Sherbert* and *Yoder* are illustrative only: The legislative history shows Congress did not intend to "express approval or disapproval of the result reached in any particular court decision involving the free exercise of religion, including those cited in the act itself. [Instead, the] bill is not a codification of the result reached in any prior free exercise decision but rather the restoration of the legal standard that was applied in those decisions. *Therefore, the compelling interest test generally should not be construed more stringently or more leniently than it was prior to Smith.*" (Sen.Rep. No. 103-111, 1st Sess., p. 9 (1993), reprinted in 1993 U.S. Code Cong. & Admin. News, at p. 1898 [Senate Judiciary Committee Report], italics added.) Federal courts have followed this advice in applying RFRA by looking to the entire body of case law decided before *Employment Division v. Smith, supra*. (E.g., *American Life League, Inc. v. Reno* (4th Cir. 1995) 47 F.3d 642, 655, fn. 6 [quoting the Sen. Judiciary Com. Rep.]; *Thiry v. Carlson* (D.Kan. 1995) 887 F.Supp. 1407, 1412.)

Read together, RFRA, the decisions interpreting RFRA, and the decisions interpreting the free exercise clause prior to *Employment Division v. Smith, supra*, 494 U.S. 872, prescribe the following analysis for cases in which a neutral, generally applicable law is claimed to burden the exercise of religion: (1)

The burden must fall on a religious belief rather than on a philosophy or a way of life.[17] (2) The burdened religious belief must be sincerely held.[18] (3) The plaintiff must prove the burden is substantial or, in other words, legally significant.[19] (4) If all of the foregoing are true, the government must "demonstrate[] that application of the burden to the person [¶] . . . is in furtherance of a compelling governmental interest; and [¶] . . . is the least restrictive means of furthering that compelling interest." (42 U.S.C. § 2000bb-1(b).)[20]

Randall, Phillips, and various amici curiae urge us to add a preliminary step to this analysis by asking, first, whether the activity subject to the challenged law constitutes the

---

[17] *Wisconsin v. Yoder, supra*, 406 U.S. 205, 215-219; see also *Thomas v. Review Bd., supra*, 450 U.S. 707, 713-718; *Werner v. McCotter* (10th Cir. 1995) 49 F.3d 1476, 1480, footnote 1; *Thiry v. Carlson, supra*, 887 F.Supp. at page 1412.

[18] *Thomas v. Review Bd., supra*, 450 U.S. at page 716; *Werner v. McCotter, supra*, 49 F.3d at page 1480, footnote 1; *Thiry v. Carlson, supra*, 887 F.Supp. at page 1412; cf. *Wisconsin v. Yoder, supra*, 405 U.S. at pages 215-219, 235.

[19] 42 U.S.C. § 2000bb-1(a) & (b); *Jimmy Swaggart Ministries v. Board of Equalization, supra*, 493 U.S. at pages 384-385; *Hernandez v. Commissioner, supra*, 490 U.S. at page 699; *Tony & Susan Alamo Foundation v. Secretary of Labor, supra*, 493 U.S. at pages 384-392; *Braunfeld v. Brown, supra*, 366 U.S. at pages 605-606; *Goodall v. Stafford County School Board* (4th Cir. 1995) 60 F.3d 168, 171; *American Life League, Inc. v. Reno, supra*, 47 F.3d at page 654; *Werner v. McCotter, supra*, 49 F.3d at page 1480.

[20] 42 U.S.C. § 2000bb-1(b); *Sherbert v. Verner, supra*, 374 U.S. at pages 403, 407-409; cf. *Wisconsin v. Yoder, supra*, 406 U.S. at pages 214-215.

exercise of religion. The renting of apartments does not, they argue, and for that reason is not entitled to protection under RFRA.

We cannot dispose of Smith's claim so easily. The religious practice FEHA is alleged to burden is not the renting of apartments, but Smith's practice of not committing the sin she believes inheres in renting to unmarried cohabitants. That the alleged burden is indirect is irrelevant; the same is true of virtually all of the cases decided under the accommodation doctrine that RFRA codified. (Cf. *Employment Division v. Smith, supra*, 494 U.S. 872, 894 (conc. opn. of O'Connor, J.) ["few States would be so naive as to enact a law directly prohibiting or burdening a religious practice as such. Our free exercise cases have all concerned generally applicable laws that had the *effect* of significantly burdening a religious practice"], italics added.) While the renting of apartments may not constitute the exercise of religion, if Smith claims the laws regulating that activity indirectly coerce her to violate her religious beliefs, we cannot avoid testing her claim under the analysis codified in RFRA. We turn to that analysis now.

That Smith's Christian beliefs are religious and that she sincerely holds them is not seriously in question. An effort was made in the hearing before the commission to show that Smith's church, the Presbyterian Church, U.S.A., does not share her view that renting to unmarried couples is a sin. That such testimony might help to evaluate a person's sincerity is not inconceivable. "One can, of course, imagine an asserted claim so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause . . . ." (*Thomas v. Review Board, supra*, 450 U.S. at p. 715.) However, "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." (*Id.* at p. 714.) Instead, all that is

necessary to establish the required sincerity is "an honest conviction" that one's religion prohibits the conduct required by law. (*Id.* at p. 716.) We therefore continue with the required analysis.

The parties disagree on the question whether Government Code section 12955, which forbids Smith to discriminate against unmarried cohabitants, substantially burdens the exercise of her religion. The answer to the question is critical. Under RFRA, unless the challenged law imposes a substantial burden, the government need not demonstrate a compelling interest justifying the law or show that the law is the least restrictive means to further the interest. (See 42 U.S.C. § 2000bb-1(a) & (b); see also *Goodall v. Stafford County School Board, supra*, 60 F.3d at p. 171; *American Life League, Inc. v. Reno, supra*, 47 F.3d at p. 654; *Werner v. McCotter*, supra, 49 F.3d at p. 1480.) The same held true under the free exercise clause prior to *Employment Division v. Smith, supra*, 494 U.S. 872. (See, e.g., *Jimmy Swaggart Ministries v. Board of Equalization, supra*, 493 U.S. at pp. 384-392; *Hernandez v. Commissioner, supra*, 490 U.S. at p. 699; *Tony & Susan Alamo Foundation v. Secretary of Labor, supra*, 471 U.S. at pp. 303-305; *Braunfeld v. Brown, supra*, 366 U.S. at pp. 605-606.)

One can imagine an accommodation doctrine, such as that which RFRA embodies, without the threshold requirement of a substantial burden. The resulting law would look something like this: When a person understood his or her religious beliefs as demanding that an activity be conducted in a particular way, and when the state required the activity to be conducted in a different way, the state would in every such instance be obliged to justify its law with a compelling interest and a showing that the law represented the least restrictive means to further the interest. Because religious beliefs can affect all aspects of life, and because each person may define

his or her own religious beliefs, even if those beliefs are not "acceptable, logical, consistent, or comprehensible to others" (*Thomas v. Review Board, supra*, 450 U.S. at p. 714), to abandon the threshold requirement of a substantial burden would considerably alter the nature and efficacy of legal duties in our constitutional system: Each person would unilaterally decide, in each of the multitude of situations affected by state regulation, which laws to obey and which to ignore. This would turn on its head the ordinary assumption that legislation on economic and social matters need only have a rational basis; instead, any declaration of sincerely held religious belief, however "[in]comprehensible"(*ibid.*), would require the state to justify any conflicting law under the compelling interest standard or forego its uniform enforcement.

The threshold requirement of a "substantial burden" helped, before *Employment Division v. Smith, supra,* 494 U.S. 872, to avoid this potential for unlimited conflict between the multitude of laws and the multitude of religious beliefs. Congress pointedly retained the threshold requirement in RFRA. While recognizing that "laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise" (42 U.S.C. § 2000bb(a)(2)), Congress undertook to afford protection only against those laws that "*substantially burden* religious exercise" (*Id.*, §2000bb(a)(3), italics added; see also, *id.*, § 2000bb(b)(1), (b)(2), 2000bb-1(a), (b).)

In enacting RFRA, Congress did not attempt to define a "substantial burden." Instead, the legislative history of the act shows Congress "expect[ed] that the courts [would] look to free exercise cases decided prior to *Smith* for guidance in determining whether the exercise of religion has been substantially burdened." (Sen.Rep. No. 103-111, 1st Sess., p. 8, *supra,* reprinted in 1993 U.S. Code Cong. & Admin. News,

at p. 1898; see *Thiry v. Carlson, supra*, 887 F.Supp. at p. 1412 [quoting Sen. Judiciary Com. Rep.].) This general reference to the law before *Employment Division v. Smith, supra*, 494 U.S. 872, does not make our task easy. While the cases decided before *Smith* do provide guidance on the question of what constitutes a substantial burden, they do not offer a generally applicable definition of substantial burden or a generally applicable test for determining when a substantial burden exists. Instead, the pre-*Smith* cases disclose a case-by-case approach to the problem of deciding whether the government should be obliged to justify a challenged law under the compelling interest test. Under these circumstances our task is not to invent a definition, or distill a test, that has never received the endorsement of Congress. Instead, to remain faithful to the language and intent of RFRA, we must compare the facts of the case before us with the facts of the cases decided before Smith and attempt to reach a consistent result.

The obvious starting points in this inquiry are the cases to which Congress specifically referred in the text of RFRA, namely *Sherbert v. Verner, supra*, 374 U.S. 398, and *Wisconsin v. Yoder, supra*, 406 U.S. 205. While examining these cases we must, however, bear in mind the admonition that Congress did not intend to "express approval or disapproval of the result reached in any particular court decision involving the free exercise of religion, *including those cited in the act itself.*" (Sen.Rep. No. 103-111, 1st Sess., p. 9, *supra,* reprinted in 1993 U.S. Code Cong. & Admin. News, at p. 1898 [italics added].)

The decision in *Sherbert v. Verner, supra*, 374 U.S. 398, is the first of a line of cases holding that a state may not refuse to pay unemployment compensation to a claimant who quit a job for religious reasons. (See also *Frazee v. Illinois Dept. of Employment Sec., supra*, 489 U.S. 829; *Hobbie v. Unemployment Appeals Com'n of Florida* (1987) 480 U.S. 136;

Thomas v. Review Bd., supra, 450 U.S. 707.) In *Sherbert, Frazee,* and *Hobbie*, the claimant refused to work on a religiously defined Sabbath. In *Thomas,* the claimant refused to help manufacture armaments. The Supreme Court has articulated the rule of these cases as follows: "'Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.'" (*Hobbie v. Unemployment Appeals Com'n of Florida, supra,* 480 U.S. at p. 141, quoting *Thomas v. Review Bd., supra*, 450 U.S. at 717, italics omitted.)

Turning to the case before us, one observes the obvious conflict between FEHA and the landlord's religious beliefs. This case, however, differs from the unemployment compensation cases in two significant respects. First, the degree of compulsion involved is markedly greater in the unemployment-compensation cases than in the case before us. In the former instance, one can avoid the conflict between the law and one's beliefs about the Sabbath only by quitting work and foregoing compensation. To do so, however, is not a realistic solution for someone who lives on the wages earned through personal labor. In contrast, one who earns a living through the return on capital invested in rental properties can, if she does not wish to comply with an antidiscrimination law that conflicts with her religious beliefs, avoid the conflict, without threatening her livelihood, by selling her units and redeploying the capital in other investments.

Second, the landlord's request for an accommodation in the case before us has a serious impact on the rights and

interests of third parties. This factor was not present in the employment-compensation cases. Because Smith is involved in a commercial enterprise, the state cannot exempt her from the antidiscrimination provisions of FEHA without affecting the members of the public she encounters in the course of her business. More specifically, to permit Smith to discriminate would sacrifice the rights of her prospective tenants to have equal access to public accommodations and their legal and dignity interests in freedom from discrimination based on personal characteristics. (Cf. *Heart of Atlanta Motel, Inc. v. United States* (1964) 379 U.S. 241, 250 ["the fundamental object of [federal civil rights legislation] was to vindicate 'the deprivation of personal dignity that surely accompanies denials of equal access to public establishments.'"].) No comparable impairment of the rights of third parties is entailed in requiring the state to pay unemployment compensation to a worker who quits a job that conflicts with his or her religious beliefs. Even if one were to postulate that the rulings in *Sherbert v. Verner*, *supra*, 374 U.S. 398, and its progeny marginally increased the costs to employers of unemployment insurance, the resulting impact on third parties is still far more attenuated than the impact on the prospective tenants in the case before us.

The other case to which Congress specifically referred in RFRA, namely *Wisconsin v. Yoder, supra*, 406 U.S. 205, is also distinguishable. In *Yoder*, a law requiring all children to attend public high school burdened the religious exercise of Amish parents; the parent's beliefs required them to educate their children at home after the eighth grade, a formative period of life, in order to protect their children from worldly influences and teach them the values and skills necessary for integration into the Amish religious community. To find the burden substantial was reasonable since the law was wholly incompatible with the Amish beliefs: Adolescence comes only once; if spent in the public schools, the harm to the Amish way

of life is permanent. In contrast, the landlord in this case does not claim that her religious beliefs require her to rent apartments; the religious injunction is simply that she not rent to unmarried couples. No religious exercise is burdened if she follows the alternative course of placing her capital in another investment.

The proposition that a burden on religion is not substantial if one can avoid it without violating one's religious beliefs is not of itself, we emphasize, a generally applicable test for identifying substantial burdens. As a factor to consider, however, the proposition finds support in cases decided before *Employment Division v. Smith, supra*, 494 U.S. 872. Such was the reasoning, for example, in *Tony & Susan Alamo Foundation v. Secretary of Labor, supra*, 471 U.S. 290. In that case, the employees of a religious foundation, who worked for room and board, objected on religious grounds to receiving the monetary wages required by the Fair Labor Standards Act (29 U.S.C. § 201 et seq.). The court rejected the claim with this reasoning: "It is virtually self-evident that the Free Exercise Clause does not require an exemption from a governmental program unless, at a minimum, inclusion in the program actually burdens the claimant's freedom to exercise religious rights. . . . Even if the Foundation were to pay wages in cash, or if the associates' beliefs precluded them from accepting the statutory amount, there is nothing in the Act to prevent the associates from returning the amounts to the Foundation, provided that they do so voluntarily. We therefore fail to perceive how application of the Act would interfere with the associates' right to freely exercise their religious beliefs." (471 U.S. at pp. 303-304, fns. omitted.)

The decision in *Braunfeld v. Brown, supra*, 366 U.S. 599, is to the same effect. In that case, Orthodox Jewish shopkeepers, who observed Saturday as the Sabbath,

challenged a law requiring shops to close on Sunday. The shopkeepers, who thus could open for business only five days a week, argued the law placed them at a serious economic disadvantage as compared to other merchants whose religious beliefs permitted them to conduct business six days a week. In this way, they argued, the law coerced them to violate their beliefs. (*Id.* at pp. 601-602.)

The United States Supreme Court rejected the shopkeepers' claim. (*Braunfeld v. Brown, supra*, 366 U.S. 599.) The court reasoned that the law "d[id] not make unlawful any religious practices of [the shopkeepers]; the Sunday law simply regulates a secular activity and, as applied to appellants, operates so as to make the practice of their religious beliefs more expensive." (*Id.* at p. 605.) The shopkeepers, the court observed, "[were] not faced with as serious a choice as forsaking their religious practices or subjecting themselves to criminal prosecution. Fully recognizing that the alternatives open to [the shopkeepers] and others similarly situated . . . retaining their present occupations and incurring economic disadvantage or engaging in some other commercial activity which does not call for either Saturday or Sunday labor . . . may well result in some financial sacrifice in order to observe their religious beliefs, still the option is wholly different than when the legislation attempts to make a religious practice itself unlawful." (*Id.* at pp. 605-606.) "[I]t cannot be expected, much less required that legislators enact no law regulating conduct that may in some way result in an economic disadvantage to some religious sects and not to others because of the special practices of the various religions." (*Id.* at p. 606.)

As the high court recognized, for the shopkeepers in *Braunfeld v. Brown, supra*, 366 U.S. 599, to have avoided the conflict between their religious beliefs and the Sunday-closing law by "engaging in some other commercial activity" (*Id.* at

606) might well have entailed an economic cost. Likewise, we may assume that for the landlord in this case to avoid the conflict between FEHA and her religious beliefs by shifting her capital from rental units to another investment would also entail a cost. An economic cost, however, does not equate to a substantial burden for purposes of the free exercise clause. To the contrary, "[i]t is well established that there is no substantial burden placed on an individual's free exercise of religion where a law or policy [regulating secular conduct] merely 'operates so as to make the practice of [the individual's] religious beliefs more expensive.'" (*Goodall v. Stafford County School Board, supra,* 60 F.3d at p. 171, quoting *Braunfeld v. Brown, supra*, 366 U.S. at p. 605, first bracketed phrase added.)

The proposition that an incidental burden on religious exercise is not substantial if it can be described as simply making religious exercise more expensive finds support in several cases in addition to those already cited. This factor, like the ability of a person to avoid a conflict between law and beliefs without violating those beliefs (e.g., *Tony & Susan Alamo Foundation v. Secretary of Labor, supra,* 471 U.S. 290; *Braunfeld v. Brown, supra*, 366 U.S. 599), may not constitute a generally applicable test for identifying substantial burdens. Nevertheless, the factor is one that courts under the relevant case law may properly consider.

In *Swaggart v. California Equalization Bd., supra,* 493 U.S. 378, for example, the high court held a state could impose its sales and use taxes on an evangelist's sale of Bibles and other religious materials. The evangelist argued the taxes burdened the exercise of his religion by reducing his income and, thus, "decreas[ing] the amount of money [he had] to spend on [his] religious activities . . . ." (*Id.* at p. 391.) The court declared the economic burden "not constitutionally significant." (*Ibid.*) Although the court "[did] not doubt the economic cost

to appellant of complying with a generally applicable sales and use tax, such a tax is no different," the court explained, "from other generally applicable laws and regulations . . . such as health and safety regulations . . . to which appellant must adhere." (*Ibid.*; see also *Hernandez v. Commissioner, supra*, 490 U.S. at pp. 698-699 [expressing doubt whether the Internal Revenue Service had imposed a substantial burden on taxpayers by disallowing deductions for payments made in exchange for religious services].)

The case of *Goodall v. Stafford County School Board, supra*, 60 F.3d 168, arose under RFRA. The parents of a child with a hearing impairment, who sent the child to a sectarian school pursuant to their religious beliefs, sued to compel the state to pay for the same transliteration services as provided to pupils in public school. The lower federal courts ruled such a payment would violate the establishment clause. When the high court held to the contrary (*Zobrest v. Catalina Foothills School Dist.* (1993) __ U.S. __ [113 S.Ct. 2462; 125 L.Ed.2d 1]; see *Goodall v. Stafford County School Board, supra,* 60 F.3d at p. 170), the parents claimed the state's refusal to provide transliteration services for their child burdened their religious exercise by imposing on them the $14,000 annual cost of a private transliterator.

The Fourth Circuit rejected the parents' claim on the ground that the economic burden on their religious exercise occasioned by the state's refusal to provide a transliterator was not constitutionally significant. The court reasoned: "It is well established that there is no substantial burden placed on an individual's free exercise of religion where a law or policy [regulating secular conduct] merely 'operates so as to make the practice of [the individual's] religious beliefs more expensive.'" (*Goodall v. Stafford County School Board, supra*, 60 F.3d at p. 171.) Thus, the state was not required to justify imposition of

the economic burden, nor was the court required to balance the burden against the state's interest in refusing to pay. (*Ibid.*)

The court in *McCarthy v. Hornbeck* (D.Md. 1984) 590 F.Supp. 936, reached the same result under the free exercise clause in a case decided before *Employment Division v. Smith, supra*, 494 U.S. 872. Parents who sent their children to a Catholic school sued to compel the state to provide them with the same transportation services as offered to public school pupils. (*McCarthy v. Hornbeck, supra,* 590 F.Supp. at p. 945.) Because the state had "not prohibited plaintiffs from practicing Catholicism" or made "any effort to prevent [them] from sending their children to parochial schools," the state's policy burdened plaintiffs' exercise of their religion, the court observed, only by making it more expensive. Thus, "[t]he question presented [was] whether this increased economic burden constitute[d] an infringement of plaintiffs' free exercise rights." (*Id.* at p. 944.) The court rejected the claim.

One last factor that is relevant here, to which we have already alluded, also properly informs the inquiry into whether an asserted burden on religion is substantial. This is whether the granting of an accommodation would detrimentally affect the rights of third parties. The parties have not brought to our attention a single case in which the Supreme Court exempted a religious objector from the operation of a general law when the court also recognized that the exemption would detrimentally affect the rights of third parties. Indeed, the notion that an accommodation might affect the rights of third parties led the Supreme Court in *Wisconsin v. Yoder, supra,* 406 U.S. 205, expressly to limit its holding to avoid such an implication. As limited, the decision cannot be read as authority for granting religiously based exemptions when to do so would sacrifice the rights of third parties.

In *Wisconsin v. Yoder, supra*, 406 U.S. 205, Justice Douglas argued in dissent that the Amish parents' rights did conflict with those of their children. (*Id.* at p. 241 et seq. (dis. opn. of Douglas, J.).) In response, the majority painstakingly demonstrated that permitting Amish parents to educate their older children at home had not been shown to burden the children's rights. "This case," the court observed, "of course, is not one in which any harm to the physical or mental health of the child or to the public safety, peace, order, or welfare has been demonstrated or may be properly inferred. The record is to the contrary, and any reliance on that theory would find no support in the evidence. [¶] . . . The dissent argues that a child who expresses a desire to attend public high school in conflict with the wishes of his parents should not be prevented from doing so. There is no reason for the Court to consider that point since it is not an issue in the case. The children are not parties to this litigation. . . . [¶] Our holding in no way determines the proper resolution of possible competing interests of parents, children, and the State in an appropriate state court proceeding in which the power of the State is asserted on the theory that Amish parents are preventing their minor children from attending high school despite their expressed desires to the contrary. . . . [¶] The State's argument proceeds without reliance on any actual conflict between the wishes of parents and children." (*Id.* at pp. 230-232, fns. omitted.)

The case before us is strikingly different than *Wisconsin v. Yoder, supra*, 406 U.S. 205, because here the conflict between the landlord's request for an accommodation and the rights of third parties is manifest. The exemption from FEHA Smith seeks can be granted only by completely sacrificing the rights of the prospective tenants not to be discriminated against by her in housing accommodations on account of marital status. To say that the prospective tenants may rent elsewhere is to deny them the full choice of available housing accommodations

enjoyed by others in the rental market. To say they may rent elsewhere is also to deny them the right to be treated equally by commercial enterprises; this dignity interest is impaired by even one landlord's refusal to rent, whether or not the prospective tenants eventually find housing elsewhere. In short, were we to grant the requested accommodation, Smith would have more freedom and greater protection for her own rights and interests, while Phillips and Randall would have less freedom and less protection.

In summary, these are the facts on which we must decide whether Smith should be exempt from the antidiscrimination provisions of FEHA: Smith's religion does not require her to rent apartments, nor is investment in rental units the only available income-producing use of her capital. Thus, she can avoid the burden on her religious exercise without violating her beliefs or threatening her livelihood. (Cf. *Tony & Susan Alamo Foundation v. Secretary of Labor, supra,* 471 U.S. at pp. 303-304; *Braunfeld v. Brown, supra,* 366 U.S. at pp. 605-606.) The asserted burden is the result not of a law directed against religious exercise, but of a religion-neutral law that happens to operate in a way that makes Smith's religious exercise more expensive. (Cf. *Swaggart v. California Equalization Bd., supra,* 493 U.S. at p. 391; *Hernandez v. Commissioner, supra,* 490 U.S. at pp. 698-699; *Goodall v. Stafford County School Board, supra,* 60 F.3d at p. 171; *McCarthy v. Hornbeck, supra,* 590 F.Supp. at p. 944.) Finally, to grant the requested accommodation would not affect Smith alone, but would necessarily impair the rights and interests of third parties. (Cf. *Wisconsin v. Yoder, supra,* 406 U.S. at p. 213.)

This set of facts does not, under the relevant case law, support Smith's argument that requiring her to comply with FEHA's antidiscrimination provisions substantially burdens her

religious exercise. Accordingly, we have no occasion to determine whether application of the statute to her furthers a compelling state interest or is the least restrictive means to further such an interest. (42 U.S.C. § 2000bb-1(a) & (b).)[21] In concluding Government Code section 12955 does substantially

---

[21] Only one court has reached the issue in the present context. The Alaska Supreme Court concluded the state had a compelling interest in protecting unmarried cohabitants against housing discrimination, and that application of the statute was the least restrictive means of furthering the state's interest. (*Swanner v. Anchorage Equal Rights Com'n, supra,* 874 P.2d at p. 280, fn. 8.) The parties dispute whether the relevant provision of FEHA serves a compelling state interest. Smith argues the state's interest in enforcing section 12955 should be narrowly defined as the interest in requiring a particular landlord, over her religious objections, to rent to a particular unmarried couple who was able to find other housing. Having defined the state's interest in this way, Smith does not find it compelling. Smith also points out that courts, in challenges under the equal protection clause (U.S. Const., 14th Amend.), have not subjected to strict scrutiny laws discriminating against persons on the basis of marital status. The commission, Randall, and Phillips, who maintain that section 12955 does serve compelling state interests, define the relevant interests more generally as preventing arbitrary discrimination in housing and in protecting the constitutional privacy rights of tenants. (*See City of Santa Barbara v. Adamson, supra,* 27 Cal.3d at pp. 130-137 [holding that persons in this state have a constitutional right to live with others who are not related by blood, marriage, or adoption, as an aspect of the right to privacy (Cal. Const., art. I, § 1)]; *Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 34, fn. 11 [citing *Adamson, supra,* 27 Cal.3d 123, as an example of a case in which strict scrutiny was applied to a privacy claim].) These parties also point to the preamble to FEHA, which declares "the practice of discrimination because of . . . marital status . . . in housing accommodations . . . to be against public policy." (Gov. Code, § 12920.) As explained above, we need not address these questions in this case. Nor do we need to consider the contention of Randall, Phillips, and the commission that to permit Smith to discriminate on religious grounds would violate the establishment clauses of the federal and state Constitutions. (U.S. Const., 1st Amend.; Cal. Const., art. I, § 4; *see Larkin v. Grendel's Den, Inc.* (1982) 459 U.S. 116 [invalidating, as an establishment of religion, a state law empowering the governing bodies of churches to veto applications for liquor licenses].)

burden Smith's religious exercise, the Court of Appeal erred.

3. The California Constitution.

The last question we must address is whether the California Constitution exempts Smith from the requirements of FEHA. The pertinent constitutional provision that particularly concerns us is article I, section 4. As relevant here, the section provides: "Free exercise and enjoyment of religion without discrimination or preference are guaranteed. This liberty of conscience does not excuse acts that are licentious or inconsistent with the peace or safety of the State." (Cal. Const., art. I, § 4.)

The parties disagree on how we should apply article I, section 4, to the case before us. Smith argues the provision, like RFRA, requires us to exempt her from FEHA unless the burden the statute imposes on her religious exercise is justified by a compelling state interest. Smith argues FEHA does not meet the test. Various amici curiae agree with Smith that article I, section 4, embodies a compelling interest test, but argue the test is satisfied by the state's interest in eradicating housing discrimination. Other amici curiae contend article I, section 4, is more analogous to the federal Constitution's free exercise clause as interpreted in *Employment Division v. Smith, supra*, 494 U.S. 872, and thus has nothing to say about neutral, generally applicable laws that incidentally burden religious exercise.

We may take it for granted that the meaning of article I, section 4, of the California Constitution is not dependent on the meaning of any provision of the federal Constitution. The state charter declares in so many words that "[r]ights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution." (Cal. Const., art.

I, § 24.) "Respect for our Constitution as 'a document of independent force' [citation] forbids us to abandon settled applications of its terms every time changes are announced in the interpretation of the federal charter." (*People v. Pettingill* (1978) 21 Cal.3d 231, 248, quoting *People v. Brisendine* (1975) 13 Cal.3d 528, 549-550.)

Nevertheless, a search for the independent meaning of article I, section 4, entails a certain amount of frustration because California courts have typically construed the provision to afford the same protection for religious exercise as the federal Constitution before *Employment Division v. Smith, supra,* 494 U.S. 872. Indeed, our more recent cases treat the state and federal free exercise clauses as interchangeable and apply, to both, the compelling state interest test articulated in *Sherbert v. Verner, supra,* 374 U.S. 398, and *Wisconsin v. Yoder, supra,* 406 U.S. 205. (See *Walker v. Superior Court* (1988) 47 Cal.3d 112, 138-141 [evaluating under *Yoder* the claim of a criminal defendant that his failure to obtain medical treatment for a child was religiously motivated]; *Molko v. Holy Spirit Assn.* (1988) 46 Cal.3d 1092, 1112-1120 [rejecting, under *Yoder*, the defense of religious motivation to a cause of action for fraud]; *In re Arias* (1986) 42 Cal.3d 667, 692 [applying *Sherbert* to prohibit electronic monitoring devices in the chapel of a Youth Authority facility]; *People v. Woody* (1964) 61 Cal.2d 716, 718, fn. 1 [reversing, under *Sherbert*, a conviction for using peyote as a sacrament of the Native American Church].)

Under the approach of these cases, the analysis that disposes of Smith's claim under RFRA also disposes of her claim under article I, section 4, of the state Constitution.

Older cases, however, suggest an approach closer to that of the United States Supreme Court in *Employment Division v.*

Smith, supra, 494 U.S. 872, which found no constitutional objection to the application to a religious objector of a neutral, generally applicable law. In *Ex parte Andrews* (1861) 18 Cal. 678, one of this court's first interpretations of article I, section 4, we rejected a challenge under the section to a Sunday closing law. Chief Justice Field set out the court's understanding of the state Constitution's free exercise guarantee in terms much like those the United States Supreme Court would later use in *Employment Division v. Smith, supra,* 494 U.S. at pages 876-880: "[Article I, section 4,] contains a guarantee for the free exercise and enjoyment of religious profession and worship, without discrimination or preference. We understand this to be an interdict against all legislation, which invidiously discriminates in favor of or against any religious system. It does not interdict all legislation upon subjects connected with religion . . . . The operation of the [Sunday Closing law] is secular, just as much as the business on which the act bears is secular; it enjoins nothing that is not secular, and it commands nothing that is religious . . . . The mere fact that this regulation takes effect upon a day which has been appropriated as a day of rest by the sanctions of a particular church, no more destroys the power of the Legislature to command abstinence from labor on that day, than the fact that if the Legislature appointed certain public business to be done on Saturday or Sunday . . . this would have been 'discriminating' against the sects, according religious sanctity to those days." (*Ex parte Andrews, supra,* 18 Cal. at pp. 684-685; cf. *Employment Division v. Smith, supra,* 494 U.S. at pp. 878-878 ["We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate"].)

Our older cases, following this approach, did not require accommodations of religiously motivated conduct. (*Gabrielli v. Knickerbocker* (1938) 12 Cal.2d 85, 90-92

[declining to reinstate a public school pupil who was expelled for refusing, on religious grounds, to salute the flag; but see *West Virginia State Board of Education v. Barnette* (1943) 319 U.S. 624]; *Gospel Army v. City of Los Angeles* (1945) 27 Cal.2d 232, 242-250 [upholding, as applied to a religious organization, municipal ordinances regulating charitable contributions and solicitations]; *Rescue Army v. Municipal Court* (1946) 28 Cal.2d 460, 470 [same; "There can be no question, therefore, that a person is free to hold whatever belief his conscience dictates, but when he translates his belief into action he may be required to conform to reasonable regulations which are applicable to all persons and are designed to accomplish a permissible objective."].) Under the approach of these cases, Smith's claim to an exemption would necessarily fail.

That the state Constitution's free exercise clause is more protective of religious exercise than the federal Constitution's free exercise clause has also been suggested.[22] No court, however, has articulated a test more protective than the test set out in *Sherbert v. Verner, supra,* 374 U.S. 398, and *Wisconsin v. Yoder, supra*, 406 U.S. 205, and now codified in RFRA. Because Smith's claim fails even under that test, as explained above, we need not address the scope and proper interpretation of article I, section 4. These important questions should await a case in which their resolution affects the outcome.

---

[22] "Although California and federal standards in this area appear to be analogous, it might be argued that Section 4 offers broader protection because it specifically refers to 'liberty of conscience.'" (Cal. Const. Revision Com., Proposed Revision of Cal. Const. articles I, XX, XXII (1971) pt. V, p. 14.)

III. DISPOSITION

The judgment of the Court of Appeal is affirmed to the extent it vacates the award of damages for emotional distress. (See *ante*, footnote 5.) In all other respects, the judgment is reversed.

GEORGE, J. and ARABIAN, J. [FOOTNOTE **], **concurring**.

FN* Reporter's Note: The opinion in *Smith* v. *Fair Employment & Housing Com.* (C007654) was superseded by the order granting review in this case. The opinion in *Donahue* v. *Fair Employment & Housing Com.* (B052118) was superseded by an order granting review on February 27, 1992 (S024538); review was dismissed and the cause remanded on September 30, 1993.

FN** Hon. Armand Arabian, retired Associate Justice of the Supreme Court, assigned by the Chairperson of the Judicial Council.

MOSK, J.; concurring:

I generally concur in the opinion prepared by Justice Werdegar. I largely join in its analysis. I fully join in its disposition: except as to the vacation of the award of damages for emotional distress, the judgment of the Court of Appeal must be reversed.

I write separately to consider the Religious Freedom Restoration Act of 1993 (hereafter sometimes RFRA), which is codified as section 2000bb et seq. of title 42 of the United States Code, and its applicability to this cause. I would not reach the question whether petitioner's defense under the statute is meritorious on its own terms. Rather, for the reasons stated below, I would simply hold that the statute itself is without effect as violative of the United States Constitution.

I

In pertinent part, the First Amendment declares that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." By their terms, these so-called "religion clauses" - individually the establishment and free exercise clauses - bind Congress and, by extension, the federal government generally - and bind them alone (see *Barron v. Baltimore* (1833) 32 U.S. (7 Pet.) 243, 247-250). They are made applicable against state legislatures and, by extension, state governments generally through incorporation in the due process clause of the Fourteenth Amendment. (*Cantwell v. Connecticut* (1940) 310 U.S. 296, 303.) They do not so much grant the individual any rights in the religious sphere as limit government from even entering therein. In other words, they do not so much empower the individual as render government altogether "incompetent." (*Ibid.*)

In *Employment Div., Ore. Dept. of Human Res. v. Smith* (1990) 494 U.S. 872 (hereafter sometimes *Smith*), the United States Supreme Court concluded that government action prohibits the free exercise of religion in violation of the First Amendment whenever it seeks to bar an individual from holding or professing whatever religious belief he chooses. It also concluded that government action imposes the same prohibition whenever it seeks to bar an individual from engaging in religious conduct, whether consisting of performance of religiously prescribed acts or abstention from religiously proscribed acts, solely because such conduct is religious. It concluded, however, that government action does *not* impose that prohibition if it is neutral and of general applicability and merely happens to prevent an individual from engaging in religious conduct.

Thus, under *Smith*, the First Amendment's free exercise clause may be spoken of as effectively granting the individual an absolute right to hold and profess whatever religious belief he chooses. It may also be spoken of as effectively granting the individual an absolute right to engage in religious conduct *immune from intentionally invidious government action.* But in no sense does it grant the individual any right to engage in such conduct *exempt from neutral and generally applicable government action.*

In the course of its analysis, the *Smith* court, in deed if not in word, abandoned the so-called "compelling government interest" test, which had been used in decisions such as *Sherbert v. Verner* (1963) 374 U.S. 398 (hereafter *Sherbert*), and *Wisconsin v. Yoder* (1972) 406 U.S. 205 (hereafter *Yoder*), for determining claims and defenses relating to exemption from neutral and generally applicable government action based on the First Amendment's free exercise clause. (See *Employment Div., Ore. Dept. of Human Res. v. Smith, supra*, 494 U.S. at pp.

882-890.) That test "requir[ed] the government to justify any substantial burden on" the exercise of religion "by a compelling [government] interest and by means narrowly tailored to achieve that interest." (*Id.* at p. 894 (conc. opn. of O'Connor, J.); accord, *id.* at p. 883.)

The *Smith* court all but declared the "compelling government interest" test to be "utterly unworkable" because its application would lead courts to attempt to go beyond their judicial powers in order to pass on questions that are ultimately religious. (*Employment Div., Ore. Dept. of Human Res. v. Smith, supra*, 494 U.S. at p. 888, fn. 4.)

The *Smith* court made plain that the threshold inquiry under the "compelling government interest" test into whether government action "substantially burdens" an individual's exercise of religion required judges to look not only to the character of the particular action but also to the nature of the specific religious conduct. (See *Employment Div., Ore. Dept. of Human Res. v. Smith, supra*, 494 U.S. at pp. 887-888, fn. 4.) The former they could do. The latter not. For they would be compelled to consider- explicitly or implicitly - the "centrality" of the conduct in question and/or the "centrality" of the underlying belief. (*Ibid.*) "There is" simply "no way out of the difficulty . . . ." (*Id.* at p. 888, fn. 4.) But "[i]t is no more appropriate for judges to determine the 'centrality' of religious beliefs before applying a 'compelling interest' test in the free exercise field, than it would be for them to determine the 'importance' of ideas before applying the 'compelling interest' test in the free speech field. What principle of law or logic can be brought to bear to contradict a believer's assertion that a particular act is 'central' to his personal faith? Judging the centrality of different religious practices is akin to the unacceptable 'business of evaluating the relative merits of differing religious claims.' [Citation.] . . . '[I]t is not within the

judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds.'" (*Id.* at pp. 886-887.) "'Constitutionally significant burden'" - a paraphrase of "substantial burden" - "would seem to be 'centrality' under another name." (*Id.* at pp. 887-888, fn. 4.) "[I]nquiry into 'severe impact'" - another paraphrase of "substantial burden" - "is no different from inquiry into centrality. [It] . . . merely substitute[s] for the question 'How important is X to the religious adherent?' the question 'How great will be the harm to the religious adherent if X is taken away?' There is no matrial difference." (*Id.* at p. 888, fn. 4.) In a word, inquiry into whether government action "substantially burdens" an individual's exercise of religion unavoidably entails an inquiry into religion.

Forgoing both praise of *Smith* and condemnation - each is available in sufficient amount, especially the latter (compare, e.g., Marshall, *In Defense of Smith and Free Exercise Revisionism* (1991) 58 U.Chi. L.Rev. 308 [defending *Smith*'s result], with, e.g., McConnell, *Free Exercise Revisionism and the Smith Decision* (1990) 57 U.Chi. L.Rev. 1109 [attacking *Smith*]) - we would do well to isolate what is at the heart of its analysis.

Put simply, *Smith* speaks about the judiciary as an institution and its lack of competence in matters of religion, whether going to an individual's religious belief or his religious conduct.

The *Smith* court did not deny the limitations the First Amendment's free exercise clause imposes on government or the rights it effectively grants to individuals. It simply construed both more narrowly than it had previously. Neither did it bar claims or defenses arising from the limitations or

rights in question. It merely abandoned a tool for use as to the claims and defenses at issue - a tool it had itself fabricated - namely, the "compelling government interest" test.

To repeat: *Smith* speaks about the judiciary as an institution and its lack of competence in matters of religion.

The word the *Smith* court uttered reaches back more than a century to the landmark church property decision in *Watson v. Jones* (1872) 80 U.S. (13 Wall.) 679 (hereafter sometimes *Watson*) - a federal common law decision that its progeny, including *Presbyterian Church v. Hull Church* (1969) 393 U.S. 440 (hereafter sometimes *Presbyterian Church*), and *Serbian Orthodox Diocese v. Milivojevich* (1976) 426 U.S. 696 (hereafter sometimes *Serbian Orthodox Diocese*), recognize as declaring the law under the First Amendment.[1]

It is simply this: "'[C]ivil courts,'" whether federal or state, "'must be incompetent judges of matters of faith, discipline, and doctrine; and . . . , if they should be so unwise as to attempt to supervise their judgments on matters which

---

[1] In his dissenting opinion in *Jones v. Wolf* (1979) 443 U.S. 595, Justice Powell explained, without contradiction by the majority, that Watson had "announced" only "principles of general federal law," since it had been "decided at a time when the First Amendment was not considered to be applicable to the States through the Fourteenth Amendment, and before *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), made state law applicable in diversity cases," including *Watson* itself. (*Jones v. Wolf, supra*, 443 U.S. at p. 617, fn. 4 (dis. opn. of Powell, J.).) Citing *Presbyterian Church* and *Serbian Orthodox Diocese*, he went on to state, again without contradiction by the majority, that those "principles" "are now regarded as rooted in the First Amendment, and are applicable to the States through the Fourteenth Amendment." (*Jones v. Wolf, supra*, 443 U.S. at p. 617, fn. 4 (dis. opn. of Powell, J.).)

come within their jurisdiction, would only involve themselves in a sea of uncertainty and doubt which would do anything but improve either religion or good morals.'" (*Watson v. Jones, supra*, 80 U.S. (13 Wall.) at p. 732.) This is surely true when they consider the lone man or woman who follows a path without any companions - and who is no less worthy of solicitude for that reason (see *Thomas v. Review Bd., Ind. Empl. Sec. Div.* (1981) 450 U.S. 707, 715-716). But it is true as well when they regard hierarchical communities. For "[i]t is not to be supposed that [they] can be as competent in the . . . religious faith of all these bodies as the ablest men in each are in reference to their own." (*Watson v. Jones, supra*, 80 U.S. (13 Wall.) at p. 729.)

To quote *Presbyterian Church*: "[T]he First Amendment forbids civil courts from" "determin[ing] matters at the very core of a religion - the interpretation of particular church doctrines and the importance of those doctrines to the religion." (*Presbyterian Church v. Hull Church, supra,* 393 U.S. at p. 450.)

To quote *Serbian Orthodox Diocese*: "[T]he general rule" under the First Amendment is that "religious controversies" - and indeed, religious questions of any sort - "are not the proper subject of civil court inquiry . . . ." (*Serbian Orthodox Diocese v. Milivojevich, supra,* 426 U.S. at p. 713.)

This is not to deny that a court might be tempted to believe itself competent in at least some religious matters and under at least some circumstances. Yet it must not yield. The essence of religion is to go beyond the bounds of reason. (See, e.g., *Thomas v. Review Bd., Ind. Empl. Sec. Div., supra,* 450 U.S. at p. 714 [stating that "religious beliefs need not be . . . logical, consistent, or comprehensible . . . in order to merit First Amendment protection"].) Judges in our polity may not follow.

II

Proceeding from the Constitution, we now turn to the Religious Freedom Restoration Act of 1993. A brief review of the statute is in order.

Section 1 of RFRA gives the statute's short title, which of course is the "Religious Freedom Restoration Act of 1993."

Section 2 of RFRA states Congress's findings and declares the statute's purposes. (42 U.S.C. § 2000bb.) Subsection (a) sets out the findings: "(1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution"; "(2) laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise"; "(3) governments should not substantially burden religious exercise without compelling justification"; "(4) in *Employment Division v. Smith*, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion"; and "(5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests." (42 U.S.C. § 2000bb(a).) Subsection (b) announces the purposes: "(1) to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened"; and "(2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government." (42 U.S.C. § 2000bb(b).)

Section 3 of RFRA contains the statute's basic rule, the

exception thereto, and the form of judicial relief. (42 U.S.C. § 2000bb-1.) Subsection (a) is the rule: "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability . . . ." (42 U.S.C. § 2000bb-1(a).) Subsection (b) is the exception: "Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person" "(1) is in furtherance of a compelling governmental interest" and "(2) is the least restrictive means of furthering that compelling governmental interest." (42 U.S.C. § 2000bb-1(b).) Subsection (c) concerns judicial relief: "A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. . . ." (42 U.S.C. § 2000bb-1(c).)

Section 4 of RFRA amends certain existing statutory provisions to authorize courts and administrative agencies to award attorney fees to the prevailing party, other than the United States, in any action or proceeding in enforcement.

Section 5 of RFRA provides the following definitions: "(1) the term 'government' includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, a State, or a subdivision of a State"; "(2) the term 'State' includes the District of Columbia, the Commonwealth of Puerto Rico, and each territory and possession of the United States"; "(3) the term 'demonstrates' means meets the burdens of going forward with the evidence and of persuasion"; and "(4) the term 'exercise of religion' means the exercise of religion under the First Amendment to the Constitution." (42 U.S.C. § 2000bb-2.)

Section 6 of RFRA contains provisions relating to the statute's coverage and meaning. Subsection (a) declares that the

statute "applies to all Federal and State law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after" its enactment. (42 U.S.C. § 2000bb-3(a).) Subsection (b) lays down as a rule of construction that "[f]ederal statutory law adopted after" the statute's enactment "is subject to" the act "unless such law explicitly excludes such application by reference" thereto. (42 U.S.C. § 2000bb-3(b).) Subsection (c) states that "[n]othing in" the statute "shall be construed to authorize any government to burden any religious belief." (42 U.S.C. § 2000bb-3(c).)

Lastly, section 7 of RFRA provides that "[n]othing in" the statute "shall be construed to affect, interpret, or in any way address that portion of the First Amendment prohibiting laws respecting the establishment of religion . . . ." (42 U.S.C. § 2000bb-4.)

When we construe RFRA, as we must, within its full context (e.g., *People v. Swain* (1996) 12 Cal.4th 593, 616-617 (conc. opn. of Mosk, J.); see, e.g., *Kopp v. Fair Pol. Practices Com.* (1995) 11 Cal.4th 607, 673 (conc. opn. of Mosk, J.)), which includes the First Amendment, *Sherbert, Yoder,* and *Smith*,[2] we arrive at the following conclusions.

---

[2] As with all other statutes, RFRA's full context includes its legislative history. (E.g., Sen.Rep. No. 103-111, 1st Sess. (1993), reprinted in 1993 U.S. Code Cong. & Admin. News, at pp. 1892-1912; H.R.Rep. No. 103-88, 1st Sess. (1993) [1993 WL 158058 (Leg.Hist.)].) And as with all others, such legislative history amounts only to context, and should never be treated as though it were text: "For a statute, as it were, is a complete integration. Within its scope, it is the final and exclusive statement by the legislative body of its intent, superseding all prior and contemporaneous expressions and implications, not only those that are directly contrary but even those that are altogether consistent. Perhaps more accurately, it is the legislative body's final and exclusive *enactment,* displacing all terms and conditions of whatever sort that could, would, or might, have been passed."

First, RFRA recognizes the First Amendment's absolute limitation against government's "burden[ing]" (RFRA § 6(c), 42 U.S.C. § 2000bb-3(c)) an individual's exercise of religion to the extent that it involves religious belief. (Compare RFRA § 3(b), 42 U.S.C. § 2000bb-1(b) [stating that "[g]overnment may substantially burden a person's exercise of religion," albeit only if it satisfies the "compelling government interest" test (italics added)], with RFRA § 6(c), 42 U.S.C. § 2000bb-3(c) [stating that "[n]othing in" the statute "shall be construed to authorize any government to burden any religious *belief*" (italics added)].) It thereby recognizes the First Amendment's effective grant to the individual of an absolute right to hold and profess whatever religious belief he chooses.[3]

Second, RFRA imposes a limitation against government's "substantially burden[ing]" (RFRA § 3(a), 42 U.S.C. § 2000bb-1(a)) an individual's exercise of religion to the extent that it involves religious conduct. It thereby effectively grants the individual a right to engage in such conduct unencumbered with such a burden.

Third, RFRA creates an exception from the limitation it imposes on government and the right it effectively grants to the individual against any "substantial burden" on the latter's exercise of religion. The exception requires government to "demonstrate[] that application of [such a] burden to the" specific religious conduct "(1) is in furtherance of a compelling

---

(*Kopp v. Fair Pol. Practices Com., supra,* 11 Cal.4th at pp. 672-673, italics in original (conc. opn. of Mosk, J.).)

[3] RFRA does not purport to allow judicial relief from any "burden" on an individual's exercise of religion to the extent that it involves religious belief. (See RFRA § 3(c), 42 U.S.C. § 2000bb-1(c).)

governmental interest" and "(2) is the least restrictive means of furthering that compelling governmental interest." (RFRA § 3(b), 42 U.S.C. § 2000bb-1(b).)

Fourth, the thus-qualified limitation RFRA imposes on government and the thus-qualified right it effectively grants to the individual against any "substantial burden" on the latter's exercise of religion are statutory. (Sen.Rep. No. 103-111, 1st Sess., pp. 2 & 14, fn. 43 (1993), reprinted in 1993 U.S. Code Cong. & Admin. News, at pp. 1893 & 1904, fn. 43 [speaking of a "statutory prohibition"]; H.R.Rep. No. 103-88, 1st Sess., p. ___ (1993) [1993 WL 158058 (Leg.Hist.), p. 1] [speaking of a "statutory right"].)[4]

Fifth, the terms whereby RFRA imposes a limitation on government and effectively grants a right to the individual as to the latter's exercise of religion, and creates an exception to such limitation and right, are not defined by reference to the world at large, but are rather conduits for definition through the judicial process in light of pertinent pre-Smith federal court decisions. (See RFRA § 2(a)(5) & (b)(1), 42 U.S.C. §

---

[4] "A statute," of course, "cannot amend the Constitution." (*Pennsylvania v. Union Gas Co.* (1989) 491 U.S. 1, 24 (conc. opn. of Stevens, J.).) RFRA does not even purport to do so. Certain language in its legislative history to the effect that Congress's purpose was "to overturn the Supreme Court's decision in *Smith*" (Sen.Rep. No. 103-111, 1st Sess., p. 12 (1993), reprinted in 1993 U.S. Code Cong. & Admin. News, at p. 1902; accord, H.R.Rep. No. 103-88, 1st Sess., p. ___ (1993) [1993 WL 158058 (Leg.Hist.), p. 11]) need not, and should not, be taken literally. (See H.R.Rep. No. 103-88, 1st Sess., p. ___, fn. 3 (1993) [1993 WL 158058 (Leg.Hist.), p. 15, fn. 3]["[T]he label 'restoration' in this context is inappropriate. Congress writes laws - it does not and cannot overrule the Supreme Court's interpretation of the Constitution and thus it is unable to 'restore' a prior interpretation of the First Amendment."].)

2000bb(a)(5) & (b)(1).)[5]

Sixth, RFRA applies to, and thereby displaces pro tanto, all other law and its implementation, whether federal or state, statutory or otherwise, coming before its enactment or after (RFRA § 6(a), 42 U.S.C. § 2000bb-3(a)), with the sole exception of any future federal statute explicitly excluding itself from its coverage (RFRA § 6(b), 42 U.S.C. § 2000bb-3(b)).[6]

Seventh, and most fundamental, all that RFRA is and all that it does depend on a threshold inquiry by a court into whether government action "substantially burdens" an individual's exercise of religion. (RFRA § 2(b)(1), 42 U.S.C. § 2000bb(b)(1); see RFRA § 3(a) & (b), 42 U.S.C. § 2000bb-1(a) & (b); see also RFRA § 2(a)(5), 42 U.S.C. § 2000bb(a)(5).) It simply adopts that inquiry from pertinent pre-Smith federal court decisions. (See RFRA § 2(b)(1), 42 U.S.C. § 2000bb(b)(1); RFRA § 2(a)(5), 42 U.S.C. § 2000bb(a)(5).)

---

[5] By contrast, the terms whereby the American Indian Religious Freedom Act Amendments of 1994 imposes a limitation on government and effectively grants a right to the individual as to the latter's exercise of religion are in fact defined by reference to the world at large. (American Indian Religious Freedom Act Amendments of 1994 § 2(b)(1), 42 U.S.C. § 1996a(b)(1) ["Notwithstanding any other provision of law, the use, possession, or transportation of peyote by an Indian for bona fide traditional ceremonial purposes in connection with the practice of a traditional Indian religion is lawful, and shall not be prohibited by the United States or any State."].)

[6] As for RFRA's potential effect on federal constitutional law, the reader should recall that a "statute cannot amend the Constitution." (*Pennsylvania v. Union Gas Co., supra,* 491 U.S. at p. 24 (conc. opn. of Stevens, J.).)

III

We may presently address the question with which we are here concerned: Is RFRA violative of the United States Constitution and therefore without effect?

Our starting point is, as it must be, the Constitution itself and its fundamental principles. Through the organic law, as Chief Justice Marshall explained in *Marbury v. Madison* (1803) 5 U.S. (1 Cranch) 137, 176 (hereafter sometimes Marbury), the people have ordained a government that is limited in its authority and, to that end, have delegated certain specified powers to each of its branches - legislative powers to the Congress, executive powers to the President, and judicial powers to the Supreme Court and any such inferior courts as Congress might establish.

What we call the principle of separation of powers, to quote the Supreme Court in *INS v. Chadha* (1983) 462 U.S. 919, 951 (hereafter sometimes *Chadha*), seeks "to assure, as nearly as possible, that each Branch of government would confine itself to its assigned responsibility." "[It] was not simply an abstract generalization in the minds of the Framers: it was woven into the document that they drafted . . . ." (*Buckley v. Valeo* (1976) 424 U.S. 1, 124 (*per curiam*).)

Clearly, the principle of separation of powers is violated if any of the branches of government "exceed[s] the outer limits of its [own] power . . . ." (*INS v. Chadha, supra,* 462 U.S. at p. 951.) So held the Supreme Court in *Chadha*. There, Congress had, in effect, unconstitutionally attempted to empower each of its houses *individually*, by resolution, to invalidate a decision by the Attorney General, acting pursuant to authority it had delegated, to allow a particular deportable alien to remain in the United States. It could indeed invalidate such a decision. But it

had to pass a bill by majority vote in each of its houses *together*, present it to the President, and, if he disapproved, repass it by two-thirds vote in each of its houses *together*.

The principle of separation of powers is also violated if any of the branches of government causes another to exceed the outer limits of *its* power. So held the Supreme Court in *Marbury*. There, through a provision of the Judiciary Act of 1789, Congress had, in effect, unconstitutionally attempted to empower the Supreme Court to issue writs of mandamus to federal officers. The issuance of such a writ would have amounted to the exercise of original jurisdiction. The Supreme Court's original jurisdiction, however, extends under clause 2 of § 2 of article III only to "Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party . . . ." Similar is *Lujan v. Defenders of Wildlife* (1992) 504 U.S. 555 (hereafter sometimes *Lujan*). There, through a so-called "citizen-suit" provision in the Endangered Species Act of 1973, Congress had, in effect, unconstitutionally attempted to empower the federal courts to entertain actions by persons seeking to vindicate the public interest in the Secretary of the Interior's compliance with the statute, without regard to whether such actions were "Cases" or "Controversies" as required by clause 1 of § 2 of article III, and without regard to whether such persons had standing as demanded by that provision. The "citizen-suit" provision would have given to the federal courts the power under § 3 of article II to "take Care that the Laws be faithfully executed" - which belongs only to the President. "It would [have] enable[d] the courts, with the permission of Congress, 'to assume a position of authority over the governmental acts of another and co-equal department,' [citation], and to become '"virtually continuing monitors of the wisdom and soundness of Executive action."'" (*Lujan v. Defenders of Wildlife, supra*, 504 U.S. at p. 577.)

In my view, the principle of separation of powers is violated here. Through RFRA, Congress has, in effect, unconstitutionally attempted to empower the courts, state as well as federal, to pass on religious questions.

In undertaking to apply RFRA and its "compelling government interest" test, a court would have to make a threshold inquiry into whether government action "substantially burdens" an individual's exercise of religion.

To do so, the court would have to take each of the following three steps. If it omitted any one, it would fail in its analysis.

First, the court would have to identify the particular government action that is asserted to cause the "substantial burden." It is surely fit to the task. It need do no more than look to the applicable official prescription or proscription.

Second, the court would have to ascertain the individual's specific religious conduct that is asserted to suffer the "substantial burden." Here, it would begin to experience difficulties. It would have to judge whether he is sincere: such protection as he may be due is based on his religion, not another's (cf. *Thomas v. Review Bd., Ind. Empl. Sec. Div., supra*, 450 U.S. at pp. 715-716 [impliedly holding as much under the First Amendment's free exercise clause]). It would also have to judge whether his conduct is *religious*: such protection as he may be due is based on his *religion*, nothing else (cf. *id.* at p. 713 [expressly holding as much under the First Amendment's free exercise clause]). To assess his sincerity would be hard. (E.g., Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion* (1989) 102 Harv.L.Rev. 933, 954-957 [hereafter Lupu].) To assess the religiousness of his conduct would be harder still. Such a

"determination" - to understate the matter - "is more often than not a difficult and delicate task . . . ." (*Thomas v. Review Bd., Ind. Empl. Sec. Div., supra*, 450 U.S. at p. 714.) How could it be otherwise? The religious belief underlying such conduct "need not be . . . logical, consistent, or comprehensible . . . ." (*Ibid.*) Finally, the problems inherent in evaluating his sincerity are exacerbated because they must be resolved in the context of the religiousness of his conduct: the question is not whether he is sincere in the abstract, but whether he is sincere in his religion. (Lupu, *supra,* 102 Harv.L.Rev. at pp. 956-957.)

Third and last, the court would have to decide whether the particular government action "substantially burdens" the individual's specific religious conduct.

The court could not simply accept either the individual's assertion or the government's denial of the requisite "substantial burden." Otherwise, it would run the risk of either allowing the individual "to become a law unto himself" (*Reynolds v. United States* (1879) 98 U.S. (8 Otto) 145, 167) or letting government act with impunity - results that are antithetical to the RFRA Congress's stated purpose of "striking *sensible* balances" between the parties (RFRA § 2(a)(5), 42 U.S.C. § 2000bb(a)(5), italics added).

Rather, the court would have to determine whether the particular government action "substantially burdens" the individual's specific religious conduct. To do so, as *Smith* makes plain, the judge would have to look not only to the character of the government action but also to the nature of the specific religious conduct. As *Smith* also makes plain, although he could do the former, he could not do the latter. For how could he even speak of a "substantial burden" unless he were to compare what we may call the "weight" of the government action *in relation* to the "bearing capacity" of the religious

conduct? And how could he do that unless he were to pass on religious questions?

It could not persuasively be argued that a court's inquiry into whether government action "substantially burdens" an individual's exercise of religion does not entail an inquiry into religion. Whatever the appearances might have been before *Smith* - an inquiry into religion was deemed avoidable - the reality afterward is to the contrary - it is not. So held the very court that devised the inquiry: To determine "substantial burden" - whether under its own name or under such paraphrases as "constitutionally significant burden" or "severe impact" - implicates determining the "centrality" of religious conduct and/or the "centrality" of the underlying religious belief. (*Employment Div., Ore. Dept. of Human Res. v. Smith, supra*, 494 U.S. at pp. 887-888, fn. 4.) But that is "'not within the judicial ken . . . .'" (*Id.* at p. 887.) On this point, of course, the *Smith* court is the final authority. The RFRA Congress simply adopted what it found in the pertinent pre-Smith federal court decisions. What it found, however, was an inquiry that extends - unavoidably - into religion. It did not even purport to limit that inquiry, as by renouncing "centrality," in an effort to salvage its constitutionality. That is the end of the matter.

Neither could it persuasively be argued that the judiciary's lack of competence in matters of religion has somehow been removed. The RFRA Congress took no steps in that direction. Had it done so, it would have faltered. For it is itself altogether "incompetent." (*Cantwell v. Connecticut, supra,* 310 U.S. at p. 303.) To be sure, it evidently believed that the courts possessed whatever power they needed. But the *Smith* court was of the opposite view. In such a dispute, as *Marbury* and *Lujan* demonstrate, the court must prevail.

It may be noted that one commentator has argued that

the "strongest reading of . . . *Smith* is that it may verge on unconstitutional for a court to inquire into the substantiality of an alleged burden on religious exercise." (Idleman, *The Religious Freedom Restoration Act: Pushing the Limits of Legislative Power* (1994) 73 Tex.L.Rev. 247, 273.)

In light of the foregoing, I am compelled to conclude that the best reading of *Smith* is stronger still: For a court to so inquire is in fact unconstitutional.[7]

IV

In sum, I am of the view that, except as to the vacation of the award of damages for emotional distress, the Court of Appeal's judgment must be reversed.

---

[7] In accord are *In re Tessier* (Bankr.D.Mont. 1995) 190 B.R. 396, 405-407, and Brant, *Taking the Supreme Court at its Word: The Implications of RFRA and Separation of Powers* (1995) 56 Mont.L.Rev. 5. I recognize that, in *Flores v. City of Boerne, Tex.* (5th Cir. 1996) 73 F.3d 1352, 1363, the court rejected a claim that "RFRA violates the separation of powers because it restores" the "compelling government interest" test after it was "rejected in *Smith* as beyond the judiciary's competence to apply." It asserted that the "test" was not in fact rejected on that basis. As shown in the text, it was. I also recognize that, in *State v. Miller* (Ct.App. 1995) 196 Wis.2d 238, 247-248, review granted (Wis. 1995) 540 N.W.2d 200; *Sasnett v. Department of Corrections* (W.D.Wis. 1995) 891 F.Supp. 1305, 1315-1321; and *Belgard v. State of Hawai'i* (D. Hawaii 1995) 883 F.Supp. 510, 512-517, the courts rejected claims that RFRA is unconstitutional. The *Miller* court did not even consider separation of powers. The *Sasnett* and *Belgard* courts did, but on a basis materially different from that on which I rest. A final point: No section or subsection of RFRA that is pertinent here shows itself to be severable from the statute as a whole. Each falls with all.

KENNARD, J.; concurring and dissenting:

At issue in this case is whether Congress's statutory guarantee of religious liberty excuses a California landlord from complying with state law prohibiting housing discrimination against unmarried cohabiting heterosexual couples when compliance would conflict with the landlord's sincerely held religious beliefs. Resolution of this issue requires a close examination of two statutes, one federal and one state.

California has adopted a strong policy against many forms of housing discrimination. This policy is a laudable one for, as I have said in an earlier case, "the act of discrimination itself demeans basic human dignity." (*Walnut Creek Manor v. Fair Employment & Housing Com.* (1991) 54 Cal.3d 245, 287 (dis. opn. of Kennard, J.).) As relevant here, California by statute prohibits housing discrimination on the basis of marital status, including discrimination against unmarried couples. California law does not exempt discrimination that is motivated by religious belief.

California's laws against discrimination, however, are not the final word in this case. Also to be considered is a federal law that protects religious liberty, a goal that has figured prominently in our nation's history. "Many of the men and women who settled in this country fled tyranny abroad to practice peaceably their religion. The Nation they created was founded upon the conviction that the right to observe one's faith, free from Government interference, is among the most treasured birthrights of every American." (Sen. Rep. No. 103-111, 1st Sess., p. 4 (1993), reprinted in 1993 U.S. Code Cong. & Admin. News 1892, 1893.)

To expansively protect religious liberty, Congress in 1993 enacted the Religious Freedom Restoration Act (42

U.S.C. §§ 2000bb to 2000bb-4; hereafter RFRA). RFRA was supported by a broad coalition that included many prominent religious organizations, as well as the American Bar Association and the American Civil Liberties Union. It received overwhelming bipartisan support in both houses of Congress; its lead sponsors in the Senate were Senators Edward Kennedy and Orrin Hatch.

RFRA provides that a person whose religious beliefs would be "substantially burden[ed]" by complying with a government law is excused from compliance unless the government can show that the law advances a "compelling governmental interest" and that it is the "least restrictive means of furthering that compelling governmental interest." (42 U.S.C. § 2000bb-1(b).) Under our federal Constitution, a federal law such as RFRA is supreme over any conflicting state law. (U.S. Const., art. VI, § 2.) Thus, if a state law barring housing discrimination substantially burdens a person's religious beliefs, Congress has, through RFRA, directed that the believer be exempted from the law unless the state can show that eliminating the discriminatory conduct in question is a "compelling" interest and that exempting the believer and others similarly situated from compliance is not a feasible alternative.

In this case, Evelyn Smith, a widow who owns two duplexes, refused to rent a vacant unit to an unmarried heterosexual couple, contrary to California law barring housing discrimination on the basis of marital status. No one questions that in doing so Smith was complying with her sincerely held religious beliefs. The plurality opinion holds that California's housing antidiscrimination law does not substantially burden Smith's religious beliefs and that therefore under RFRA the state need not justify its action by showing that it is the least restrictive means of advancing a compelling governmental

interest.

I would hold to the contrary. In requiring Smith to comply with state law by renting to an unmarried couple, contrary to her sincerely held religious beliefs, the state has "substantially burden[ed]" Smith's exercise of her religious beliefs within the meaning of RFRA. Passing to RFRA's "compelling governmental interest" test, it is questionable whether California has carried its burden of showing that eliminating housing discrimination against unmarried heterosexual couples is a compelling governmental interest of the same high order as, for instance, eliminating racial housing discrimination. It is not necessary to resolve that issue here, however, for on the fully developed record in this case, the state has failed to prove that it would be infeasible to exempt Smith and others with sincerely held religious objections from the state's prohibition of housing discrimination against unmarried heterosexual couples. Therefore, RFRA precludes the state from requiring Smith to rent to unmarried heterosexual couples contrary to her religious beliefs.

I

Petitioner Evelyn Smith owns two duplexes in Chico, Butte County. For religious reasons, Smith objects to sex outside of marriage and believes she will be punished by God if she permits such sex to occur in her rental units. Kenneth Phillips and Gail Randall, an unmarried heterosexual couple, wished to rent one of Smith's units. Because of her religious beliefs, Smith told them that she did not rent to unmarried couples. Initially, they told Smith they were married; she agreed to rent them the unit. Later, they told her they were not married; she refused to rent to them.

Phillips and Randall each filed a complaint against

Smith with the Fair Employment Housing Commission (hereafter the Commission). The Commission issued two accusations, alleging Smith had violated the Fair Employment and Housing Act (Gov. Code, § 12900 et seq.; hereafter FEHA), and the Unruh Civil Rights Act (Civil Code, § 51). FEHA prohibits, among other things, "the owner of any housing accommodation to discriminate against any person because of the race, color, religion, sex, *marital status*, national origin, ancestry, familial status, or disability of that person." (Gov. Code, § 12955, subd. (a), italics added.) The Unruh Civil Rights Act provides that "[a]ll persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, or disability are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever." (Civ. Code, § 51.) FEHA also makes it an unlawful practice under FEHA to violate the Unruh Civil Rights Act. (Gov. Code, § 12948.)

Smith defended on the ground that FEHA and the Unruh Civil Rights Act do not protect unmarried couples from discrimination and on the ground that the free exercise clauses of the state and federal Constitutions permit her to discriminate for religious reasons. After a hearing, an administrative law judge issued a proposed decision that Smith had violated FEHA and the Unruh Civil Rights Act. Addressing Smith's free exercise of religion defense, the administrative law judge found that those laws substantially burdened the free exercise of Smith's religious beliefs but that they were justified by the state's compelling interest in eliminating discrimination.

The Commission, however, did not adopt the administrative law judge's proposed decision but decided the case itself on the existing record. The Commission found that Smith had violated FEHA and the Unruh Civil Rights Act in

refusing to rent to Phillips and Randall. The Commission concluded that under the California Constitution it lacked jurisdiction to address Smith's constitutional arguments. (Cal. Const., art. III, § 3.5.) As relief, the Commission ordered Smith to cease and desist from discriminating, to post notices signed by her stating that she had violated housing discrimination laws and setting forth information about prohibited housing discrimination, and to pay a total of $954 in damages to Phillips and Randall.

Smith filed a petition for a writ of mandate in the Court of Appeal. The court granted the writ and directed that the Commission vacate its decision and dismiss the accusation and complaints against petitioner. The Court of Appeal held that, because the Commission had ordered Smith to post notices of nondiscrimination, her right to free speech was implicated as well as her right to the free exercise of religion. It further held that the state was prohibited by the state and federal Constitutions and the federal RFRA from requiring Smith to rent to unmarried couples contrary to her religious beliefs.

II

A majority of the court holds, and I concur, that California law, through FEHA, protects unmarried couples from housing discrimination. The controlling issue then becomes whether the recent enactment of RFRA by Congress permits Smith, contrary to FEHA but in accord with her religious beliefs, to refuse to rent to unmarried heterosexual couples like Randall and Phillips. Although this is a case involving religious liberty, it does not turn on the free exercise of religion clauses found in the federal and state Constitutions, but on the statutory protection for religious liberty provided by Congress in RFRA.

Congress enacted RFRA in 1993 in response to the United States Supreme Court's decision in *Employment Div., Ore. Dept. of Human Res. v. Smith* (1990) 494 U.S. 872 (hereafter *Smith*), which substantially cut back on the protection that the high court's prior decisions had accorded to religiously motivated conduct under the free exercise clause of the federal Constitution. *Smith* held that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" (*Smith, supra*, 494 U.S. at p. 879.) Under *Smith*, therefore, no matter how great a burden a law may impose on religious conduct, the free exercise clause of the federal Constitution does not exempt the believer from compliance so long as the law is a "neutral law of general applicability."

Prior to *Smith, supra*, 494 U.S. 872, the United States Supreme Court had applied a "compelling governmental interest" test in determining whether governmental actions that burdened the free exercise of religion were permissible. Under that test, the government must show that its action "is the least restrictive means of achieving some compelling state interest." (*Thomas v. Review Bd., Ind. Empl. Sec. Div.* (1981) 450 U.S. 707, 718.)

Congress specifically enacted RFRA to *broadly* expand protection for religiously motivated conduct, particularly for religious minorities, after the United States Supreme Court had sharply cut back such protection in *Smith, supra*, 494 U.S. 872.[1] In the words of the Senate Report: "By lowering the level

---

[1] The breadth of support for RFRA was striking. Supporters included a broad coalition of religious groups as well as a range of other groups including the American Bar Association, American Civil Liberties

of constitutional protection for religious practices, [*Smith*] has created a climate in which the free exercise of religion is jeopardized. . . . [¶] State and local legislative bodies cannot be relied upon to craft exceptions from laws of general application to protect the ability of the religious minorities to practice their faiths . . . . [¶] To assure that all Americans are free to follow their faiths free from governmental interference, the committee finds that legislation is needed to restore the compelling interest test. As Justice O'Connor stated in *Smith*, '[t]he compelling interest test reflects the First Amendment's mandate of *preserving religious liberty to the fullest extent possible in pluralistic society.*'" (Sen. Rep. No. 103-111, 1st Sess., p. 8, supra, italics added, fns. omitted, reprinted in 1993 U.S. Code Cong. & Admin. News 1892, 1897-1898.)

Congress expressly adopted the compelling interest test in RFRA. Under the heading "Purposes," RFRA states that it "restore[s] the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) . . . ." (42 U.S.C. § 2000bb(b)(1).) RFRA goes on to state that "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b)." (42 U.S.C. § 2000bb-1(a).) Under subsection (b), "[g]overnment may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to

---

Union, Americans United for Separation of Church and State, the Christian Legal Society, and the Home School Legal Defense Association. (Laycock & Thomas, *Interpreting the Religious Freedom Restoration Act* (1994) 73 Tex.L.Rev. 209, 210 & fn. 9.) RFRA passed the House of Representatives without opposition, and only three senators voted against it. (139 Cong. Rec. H2356-03, H2363 (daily ed. May 11, 1993); 139 Cong. Rec. H8713-04, H8715 (daily ed. Nov. 3, 1993); 139 Cong. Rec. S14461-01, S14471 (daily ed. Oct. 27, 1993).)

the person . . . [¶] (1) is in furtherance of a compelling governmental interest; and [¶] (2) is the least restrictive means of furthering that compelling governmental interest." (42 U.S.C. § 2000bb-1(b).)

The threshold question in analyzing a claim under RFRA is whether the government has "substantially burden[ed] a person's exercise of religion"; if the government has done so, then it must demonstrate that the burden furthers "a compelling governmental interest" and is the "least restrictive means" of doing so. (42 U.S.C. § 2000bb-1(a), (b).) Thus, in applying RFRA to this case, the first step is to determine whether California's statutory requirement under FEHA that Smith not discriminate against unmarried heterosexual couples like Phillips and Randall substantially burdens Smith's exercise of her religious beliefs.

III

The plurality opinion holds that FEHA does not "substantially burden" Smith's exercise of her religious beliefs by compelling her, against her religious beliefs, to rent to unmarried heterosexual couples. By holding that Smith has not met RFRA's threshold "substantial burden" test, the plurality opinion avoids having to address the question of whether requiring Smith to rent to unmarried heterosexual couples furthers a compelling governmental interest that cannot be achieved by less restrictive means. Unlike the plurality opinion, I am of the view that FEHA does substantially burden Smith's exercise of her religious beliefs.

Although it concludes that FEHA's requirement that Smith rent to unmarried heterosexual couples does not substantially burden Smith's exercise of her religious beliefs against renting to such couples, the plurality opinion is unable

to discern any governing principle underlying the selected cases it surveys that address the substantial burden requirement. The meaning of substantial burden, however, is not as obscure and indeterminate as the plurality opinion believes it to be. In adopting the substantial burden test, Congress did not set loose a doctrinal chameleon for courts to chase through a jurisprudential swamp. Congress intended the substantial burden requirement to serve as a simple threshold test; it did not intend that every RFRA case would be the occasion for an open-ended metaphysical inquiry into the meaning of substantial burden.

In this case in particular, the high court's free exercise clause decisions predating *Smith, supra*, 494 U.S. 872, directly refute the plurality opinion's conclusion that FEHA does not substantially burden Smith's exercise of her religious beliefs. Those decisions show that a substantial burden exists where, as here, (1) a religious adherent engages in a particular activity; (2) a governmental command relating to the activity conflicts with the adherent's religious beliefs concerning the activity; (3) the conflict is irreconcilable (that is, to satisfy the governmental command the adherent must either abandon the activity or violate his or her religious beliefs); and (4) the detriment to the adherent from abandoning the activity creates substantial secular pressure on the adherent to violate his or her religious beliefs rather than abandon the activity.

I begin with the first case that the text of RFRA directs us to, *Sherbert v. Verner* (1963) 374 U.S. 398 (hereafter *Sherbert*). (42 U.S.C. § 2000bb(b)(1).) *Sherbert* was the first in a series of United States Supreme Court cases in which the court held that it violated the free exercise clause of the federal Constitution to deny unemployment benefits to persons who had become unemployed because of a conflict between their religious beliefs and the demands of their employers.

As Congress and legal commentators have observed, it was in Sherbert that the high court first fully articulated its modern free exercise clause jurisprudence, which lasted until the high court's decision in *Smith, supra*, 494 U.S. 872. (Sen. Rep. No. 103-111, 1st Sess., p. 5, *supra*, reprinted in 1993 U.S. Code Cong. & Admin. News 1892, 1894 ["Meaningful constitutional protection against these abuses [burdening the free exercise of religion] began 30 years ago, with the Supreme Court's landmark decision in *Sherbert v. Verner*. (Fn. omitted.)"]; McConnell, *The Origins and Historical Understanding of Free Exercise of Religion* (1990) 103 Harv.L.Rev. 1409, 1412 ["... *Sherbert v. Verner*, [is] the first and leading case in the Supreme Court's modern free exercise jurisprudence .... (Fn. omitted.)"]; Lupu, *Where Rights Begin: The Problem Of Burdens On The Free Exercise Of Religion* (1989) 102 Harv.L.Rev. 933, 941; Choper, *The Rise and Decline of the Constitutional Protection of Religious Liberty* (1991) 70 Neb.L.Rev. 651, 655.) The *Sherbert* decision was widely discussed and relied on in the congressional committee reports on RFRA and in the floor debates in Congress. (Sen. Rep. No. 103-111, 1st Sess., pp. 5, 13, supra, reprinted in 1993 U.S. Code Cong. & Admin. News 1892, 1894, 1903; H. R. Rep. 103-88, 1st Sess., pp. 2-9 (1993); remarks of Sen. Feingold, 139 Cong. Rec. S14461-01, S14468 (daily ed. Oct. 27, 1993) ["[RFRA] is designed to ... codify the Free Exercise Exemptions Doctrine established in *Sherbert versus Verner*"]; remarks of Sen. Bradley, *id.* at p. S14469 ["Our modern day jurisprudence on the free exercise clause can be traced back 30 years, when in 1963 the Supreme Court issued its landmark decision, *Sherbert versus Verner*."]; remarks of cosponsor Sen. Hatch, *id.* at p. S14470 ["RFRA reestablishes a very familiar and traditional standard of review that the courts have been applying since the 1963 decision *Sherbert v. Verner*."].)

The religious believer in *Sherbert* was a Seventh Day

Adventist whose Sabbath was Saturday. She was fired from her job when, in accordance with her religious beliefs, she refused to work on Saturdays as her employer required. She applied for unemployment benefits, which the state denied because she had refused to work on Saturdays. The United States Supreme Court held that the believer was entitled to unemployment benefits because the state had burdened her religious belief against working on Saturdays.

The high court described the burden as "forc[ing] [the believer] to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand." (*Sherbert, supra*, 374 U.S. at p. 404.) The court rejected the argument that the indirect economic pressure exerted by the state's denial of a "gratuitous benefit" (*id.* at p. 405) was insufficient to constitute a burden on the believer's exercise of her religion: "In a sense the consequences of [being denied unemployment benefits] . . . may be only an indirect result of welfare legislation within the State's general competence to enact . . . . but the pressure upon her to forego [the] practice [of her religion] is unmistakable." (*Id.* at pp. 403-404.)

The court reached the same conclusion in three later cases in which individuals were denied unemployment benefits after they were fired from or quit their employment because it conflicted with their religious beliefs: *Thomas v. Review Bd., Ind. Empl. Sec. Div., supra*, 450 U.S. 707; *Hobbie v. Unemployment Appeals Comm'n of Fla.* (1987) 480 U.S. 136; and *Frazee v. Illinois Employment Security Dept.* (1989) 489 U.S. 829. In *Thomas*, discussing the meaning of a substantial burden on religion, the high court stated: "Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit

because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists." (*Thomas v. Review Bd., Ind. Empl. Sec. Div., supra,* 450 U.S. at pp. 717-718.)

In these unemployment benefits cases, the United States Supreme Court found a significant burden on the exercise of religion even though the believers' religious beliefs did not compel them to engage in the activity (whether defined as voluntary private employment or as the application for unemployment benefits that followed the termination of private employment) that conflicted with their beliefs. Instead, what the high court found determinative was that "the employee was forced to choose between fidelity to religious belief and continued employment; the forfeiture of unemployment benefits for choosing the former over the latter brings unlawful coercion to bear on the employee's choice." (*Hobbie v. Unemployment Appeals Comm'n of Fla., supra,* 480 U.S. 136, 144.)

Here, Smith is faced with a similar, and similarly burdensome, choice. In requiring Smith to rent to an unmarried heterosexual couple against her sincerely held religious beliefs, the state substantially burdens Smith's exercise of religion because it "conditions receipt of an important benefit [that is, the right to engage in the rental housing business] upon conduct proscribed by a religious faith, . . . thereby putting substantial pressure on [her] to modify [her] behavior and to violate [her] beliefs." (*Thomas v. Review Bd., Ind. Empl. Sec. Div., supra,* 450 U.S. at pp. 717-718.) No less than the believer in *Sherbert, supra,* 374 U.S. 398, Smith is "force[d] . . . to choose between following the precepts of her religion and forfeiting [the right to rent her property], on the one hand, and abandoning one of the precepts of her religion in order to [rent her property], on

the other hand." (*Sherbert, supra*, 374 U.S. at p. 404.)

Denying unemployment benefits to anyone who quits a job for religious reasons creates economic pressure to remain at a job in violation of one's religious beliefs; likewise here, prohibiting housing discrimination against unmarried couples creates economic pressure on Smith to rent housing to unmarried heterosexual couples in violation of her religious beliefs. Just as the economic pressure on the unemployed was a substantial burden in *Sherbert, supra*, 374 U.S. 398, and its progeny, so too the economic pressure on Smith in this case is a substantial burden on her exercise of her religious beliefs. In each case, neutral state rules in combination with strong economic incentives create substantial pressure on the believer to engage in voluntary commercial activity in a manner that conflicts with the believer's religious beliefs; in each case, those beliefs do not compel participation in the activity but *participation on the government's terms necessarily violates those beliefs*.

Indeed, here Smith is subject to substantially more government coercion than the employees who were denied unemployment benefits in the cases discussed above; they lost only the opportunity for a state-conferred monetary benefit by conforming to their beliefs, while in this case the state has imposed on Smith civil penalties and a cease-and-desist order dictating her future conduct. In addition, the cease-and-desist order may be entered as a judgment (Gov. Code, § 12973, subd. (b)), which would thereby make Smith liable to additional fines and imprisonment should she follow her religious beliefs and refuse to obey the cease-and-desist order (Code Civ. Proc., § 1218).

Other free exercise decisions by the United States Supreme Court predating *Smith, supra*, 494 U.S. 872, also

demonstrate that Smith's exercise of her religious beliefs has been substantially burdened in this case. For instance, in *United States v. Lee* (1982) 455 U.S. 252, 256-258, the Amish proprietor of a carpentry shop refused to withhold and pay Social Security taxes on his employees' income because of his religious beliefs. The high court concluded that "[b]ecause the payment of the [Social Security] taxes or receipt of [Social Security] benefits violates Amish religious beliefs, compulsory participation in the social security system interferes with their free exercise rights" and could only be justified by showing that "it is essential to accomplish an overriding governmental interest." (*Id.* at pp. 257-258.)

And, in *Bowen v. Roy* (1986) 476 U.S. 693, the government's requirement that persons requesting welfare benefits furnish a Social Security number to the welfare agency conflicted with the religious belief of the Native American in that case; a majority of the high court found that this requirement burdened the individual's religious beliefs and that the government had not justified the burden. (*Id.* at pp. 727-728 (conc. and dis. opn. of O'Connor, J., concurred in by Brennan and Marshall, JJ.); *id.* at pp. 715-716 (conc. opn. of Blackmun, J., concurring in opinion of O'Connor, J., on this issue); *id.* at p. 733 (dis. opn. of White, J.).) In neither *Lee* nor *Roy* did the person's religious beliefs compel participation in the activity that created the conflict (employing carpenters in a carpentry shop in *Lee*; applying for welfare benefits in *Roy*), and thus the believer could have avoided the conflict without doing violence to those beliefs by abandoning the activity. Indeed, in both cases the motivation for the activity was economic gain, not religious observance; yet the high court nonetheless held that each of these conflicts resulted in a constitutionally significant burden on the believer that the government had to justify under

the compelling interest test.[2]

It is thus not surprising that Massachusetts's highest court has concluded, as do I, that under the United States Supreme Court's case law prior to *Smith, supra*, 494 U.S. 872, forcing a landlord to rent to unmarried heterosexual couples contrary to his or her religious beliefs substantially burdens the landlord's exercise of religious beliefs. In *Attorney General v. Desilets* (1994) 418 Mass. 316 [636 N.E.2d 23 3], the Supreme Judicial Court of Massachusetts was faced with a similar statute outlawing marital status discrimination in housing. As here, a landlord with religious objections to sex outside of marriage refused to rent to an unmarried heterosexual couple. The court held that Massachusetts's prohibition against housing discrimination based on marital status substantially burdened the free exercise of the landlord's religious beliefs.[3] (418 Mass. at pp. 323-325 [636 N.E.2d at pp. 236-238] & fn. 5.)

---

[2] In analyzing the pre-*Smith, supra*, 494 U.S. 872, free exercise decisions clause of the United States Supreme Court, Professor Tribe likewise has concluded that a conflict between a religious belief and a governmental command amounts to a substantial burden. (Tribe, American Constitutional Law (2d ed. 1988), § 14-12, p. 1242 ["In order to gain the exemption, the claimant must show (1) a sincerely held religious belief, which (2) *conflicts with, and thus is burdened by*, the state requirement." (Italics added.)].)

[3] Although the landlord's claim of an exemption in the Massachusetts case arose under the Massachusetts Constitution, the Massachusetts high court adopted and applied the substantial burden standard of pre-*Smith, supra*, 494 U.S. 872, federal case law discussed in this section of my opinion. (*Attorney General v. Desilets, supra,* 418 Mass. 316, 321-323 [636 N.E.2d 233, 236-237].) The court expressly noted that the standard it applied was the same as that of RFRA. (Id. at p. 322 [636 N.E.2d at p. 236] fn. 5.)

IV

The plurality opinion attempts to distinguish the United States Supreme Court's unemployment benefits cases on two grounds, neither of which has merit. First, it is of the view that because Smith is not a wage-earner, she is subject to less compulsion than were the religious adherents in the unemployment benefits cases. Second, it attempts to distinguish those decisions on the ground that granting Smith an exemption from FEHA's requirements would have an adverse impact on the rights that FEHA grants to Phillips and Randall. I shall examine each of these arguments in turn.

The plurality opinion takes the position that the rationale of the unemployment benefit cases does not apply here because "the degree of compulsion involved is markedly greater in the unemployment-compensation cases." (Plur. opn., *ante*, at p. 29.) This is wrong. The plurality opinion ignores that, as noted above, Smith is subject to greater, not less, coercion than those who follow their religious beliefs rather than their employers' demands. If they are fired and denied unemployment benefits, they only lose a state subsidy of their transaction costs in finding new employment. For following her religious beliefs rather than FEHA, however, Smith is subject to civil penalties, a cease-and-desist order dictating her future conduct, and imprisonment.

Nor is the compulsion any less because, as the plurality opinion notes, Smith can sell her two duplexes and invest the proceeds in some other enterprise, a process the plurality opinion terms "redeploying . . . capital." (Plur. opn., *ante,* at p. 29.) The employees in the unemployment benefits cases discussed above could have likewise sought other forms of employment that did not conflict with their religious beliefs or have chosen not to apply for benefits when they quit work, but

that fact did not justify the denial of benefits to them when they quit work for religious reasons. Under the plurality opinion's reasoning, the Amish carpenter in *United States v. Lee, supra,* 455 U.S. 252, could have "redeployed" his assets into an investment that did not require him to hire employees subject to the Social Security tax, and the Native American in *Bowen v. Roy, supra,* 476 U.S. 693, could have avoided having to submit a Social Security number to the government by choosing not to apply for welfare benefits. The hypothetical possibility of avoiding the conflict between religious belief and governmental rules by abandoning the activity in question, however, did not nullify the actual substantial burdens to which the government subjected each of these religious believers.

The plurality opinion also maintains that the compulsion was greater in the unemployment benefits cases than it is here because the religious adherents in those cases earned their income from personal labor while Smith lives on "the return on capital." (Plur. opn., *ante*, at p. 29.) Smith, however, is not a passive investor who receives investment income without personal effort. She earns her income by actively managing her rental property. She testified she spent substantial time personally maintaining the duplexes. In addition, when a unit is vacant, she personally places the advertisements, takes the calls from prospective tenants, and interviews them. Thus, Smith does earn her livelihood from personal labor.

Nor does the scope of RFRA's protection of religious freedom turn on the valorization of labor over capital that the plurality opinion relies on. Changing jobs and changing investments both entail transaction costs. There is no basis for the plurality opinion's assumption that transaction costs of changing capital investments cannot amount to "substantial pressure on [an adherent] to modify [her] behavior and to

violate [her] beliefs" (*Thomas v. Review Bd., Ind. Empl. Sec. Div., supra*, 450 U.S. at pp. 717-718), as do the transaction costs of changing jobs. In this case, Smith is a widow, and the two duplexes are her major source of income. The costs to Smith of switching to an alternative investment may be substantial, for in addition to the expenses of selling her property and locating an alternative investment, she may have to pay large capital gains taxes on the transaction, given that she has owned the duplexes for over 20 years. These expenses and taxes could significantly reduce the amount of capital she has to reinvest, and thereby permanently reduce her income and standard of living, even assuming she could find an investment with a comparable rate of return at an equivalent risk.

Finally, as a factual matter, the plurality opinion errs in asserting that greater compulsion exists in the unemployment benefits cases because it is "not . . . realistic" to imagine that a religious believer would, in the absence of unemployment benefits, quit work to avoid a conflict between religious belief and an employer's demands. (Plur. opn., *ante*, at p. 29.) While the plurality opinion may find it unbelievable that any religious person would be so "unrealistic" as to choose fidelity to religious belief over livelihood, history shows that people of faith throughout the centuries have been willing to sacrifice not only their livelihoods but their very lives for their beliefs. Indeed, the religious adherents in *Sherbert, supra*, 374 U.S. 398, *Thomas v. Review Bd., Ind. Empl. Sec. Div., supra*, 450 U.S. 707, *Hobbie v. Unemployment Appeals Comm'n of Fla., supra*, 480 U.S. 136, and *Frazee v. Illinois Employment Security Dept., supra*, 489 U.S. 829, all chose to sacrifice their jobs rather than their religious beliefs even though they were denied unemployment benefits. So much for the plurality opinion's "realism."

The second ground on which the plurality opinion seeks

to distinguish the unemployment cases is that granting an accommodation to Smith would have an impact on the FEHA rights of prospective tenants Phillips and Randall. (Plur. opn., *ante,* at pp. 29-30, 35-36.) In doing so, the plurality opinion conflates the substantial burden inquiry and the compelling interest test. The question at the substantial burden stage is *not* whether Smith is entitled to an accommodation nor whether, "were we to grant the requested accommodation, Smith would have more freedom and greater protection for her own rights and interests, while Phillips and Randall would have less freedom and less protection." (Plur. opn., *ante,* at p. 36.) Rather, the question is simply what effect the requirements of FEHA have on Smith's exercise of her religious beliefs. In the words of RFRA, the question is whether Smith is "[*a*] *person* whose religious exercise has been burdened" (42 U.S.C. § 2000bb-1(c), italics added), not whether some other person would be adversely affected if Smith were granted an accommodation.

It is in the compelling interest test, as discussed in part VI below, that the FEHA rights of Phillips and Randall are properly taken into account. The benefit that the regulation provides to third parties is one factor that could conceivably strengthen the state's interest in enforcing its regulation. Nor does anything in *Wisconsin v. Yoder* (1972) 406 U.S. 205, the sole case relied on by the plurality opinion in its third party impact discussion, suggest that third party impact is a factor to be considered at the substantial burden stage rather than as part of the compelling interest test.

The purpose of the substantial burden inquiry is to determine whether further judicial inquiry is warranted into the state's justifications for the burden it has imposed on an individual's exercise of religious beliefs. To consider at the substantial burden stage, as the plurality opinion does, the third

party impact of a hypothetical accommodation for the religious adherent subverts this purpose. The FEHA rights of Phillips and Randall are creations of state statute, not fundamental constitutional rights. They are of recent vintage and limited scope. Using them to negate the substantial burden on Smith and thereby avoid reaching the compelling interest test results in a blind deference to state policy judgments infringing religious freedom. Under the plurality opinion's reasoning, state-created statutory rights of third parties automatically trump the federally created right of religious freedom under RFRA without any judicial inquiry into the importance of those third party rights and the degree to which they would be impacted by an accommodation.

V

In addition to attempting to distinguish the unemployment benefits cases decided by the United States Supreme Court, the plurality opinion rests its conclusion that in this case Smith's religious beliefs are not substantially burdened on two other "factors": its contention that Smith can avoid the burden on the exercise of her religious beliefs without violating her beliefs by abandoning the housing rental business (plur. opn., ante, at pp. 31-32), and its related contention that the only effect of FEHA is to make the exercise of Smith's religious beliefs more expensive (plur. opn., *ante*, at pp. 32-35). What the plurality opinion fails to recognize, however, is the fundamental feature distinguishing this case and others in which courts have found a substantial burden from the cases that the plurality opinion relies on to derive its two factors. In the cases relied on by the plurality opinion, the religious adherent could comply with both the religious belief and the government law *without abandoning the activity in question.* In this case and others in which courts have found a substantial burden on the exercise of religious beliefs, the religious

adherent cannot avoid the conflict between religious belief and government law except by abandoning the activity in question. The following review of the case law makes this point clear.

The plurality opinion relies on *Braunfeld v. Brown* (1961) 366 U.S. 599 (hereafter *Braunfeld*) to support its conclusion that the state has not substantially burdened Smith's exercise of her religious beliefs because she could avoid the conflict between FEHA and her religious beliefs by abandoning the housing rental business. This reliance is misplaced for two reasons. First, *Braunfeld, supra*, 366 U.S. 599, is consistent with the result I reach in this case. In *Braunfeld*, Orthodox Jewish shopkeepers who for religious reasons closed on Saturdays were also subject to a law compelling them to close on Sundays. They contended that the Sunday closing law infringed the free exercise of their religious beliefs because, in combination with their religious beliefs, it resulted in closure of their businesses for two days a week (Saturday and Sunday) while other shopkeepers were only closed one day a week (Sunday). The high court rejected their claim.

The Sunday closing law in *Braunfeld, supra*, 366 U.S. 599, did not conflict with the religious beliefs of the Orthodox Jewish shopkeepers, because nothing in their religion compelled them to do that which the government prohibited (that is, nothing in their religion required them to be open on Sunday). Accordingly, the burden was not substantial because the Orthodox Jewish shopkeepers could comply with their religious beliefs without violating the law and without abandoning the activity in question. Here, by contrast, if landlord Smith complies with her religious beliefs without abandoning the activity in question she will violate the law, for her religious beliefs require her, contrary to state law embodied in FEHA, to refuse to rent to cohabiting unmarried heterosexual couples.

Second, *Braunfeld, supra*, 366 U.S. 599, represented only the first step by the United States Supreme Court in the development of its modern free exercise clause jurisprudence, not its full flowering. As I have noted previously, it was not until the subsequent unemployment benefits case of *Sherbert, supra*, 374 U.S. 398, that the high court first established its modern free exercise clause jurisprudence, and *Sherbert* went beyond *Braunfeld* in significant ways. (McConnell, *The Origins and Historical Understanding of Free Exercise of Religion, supra*, 103 Harv.L.Rev. 1409, 1412 ["... *Sherbert v. Verner*, [is] the first and leading case in the Supreme Court's modern free exercise jurisprudence .... (Fn. omitted.)"]; Lupu, *Where Rights Begin: The Problem Of Burdens On The Free Exercise Of Religion, supra,* 102 Harv.L.Rev. 933, 941 ["[C]ommentators see *Sherbert*, rather than *Braunfeld*, as marking the commencement of the contemporary law of free exercise. (Fn. omitted.)"]; Choper, *The Rise and Decline of the Constitutional Protection of Religious Liberty, supra*, 70 Neb.L.Rev. 651, 655 ["In [*Sherbert*], the Court abandoned *Braunfeld*'s distinction between direct and indirect impacts upon religious conduct, and afforded religious action a level of constitutional protection that it had not before enjoyed."].)[4]

---

[4] Professor Tribe has described in these terms the ways in which *Sherbert, supra*, 374 U.S. 398, superseded *Braunfeld, supra*, 366 U.S. 599: "Two years after *Braunfeld*, [in *Sherbert*] the Supreme Court took a major step beyond these precedents, extending and solidifying the principles latent in its previous holdings. ... [¶] *Sherbert* went well beyond the precedents in two important ways, the combination of which made the free exercise clause a vastly more powerful instrument for generating government accommodations of religion. [¶] First, *Sherbert* rejected *Braunfeld's* distinction between direct and indirect burdens .... [¶] ... [¶] *Sherbert's* second important doctrinal advance was in formally adopting the least restrictive alternative-compelling state interest mode of analysis in a free exercise context." (Tribe, American Constitutional Law, *supra*, section 14-13, pp. 1255-1256, fns. omitted.)

Nor do the other cases cited by the plurality opinion support its position that Smith's exercise of her religious beliefs is not substantially burdened by FEHA. (See *Jimmy Swaggart Ministries v. Cal. Bd. of Equalization* (1990) 493 U.S. 378; *Hernandez v. Commissioner* (1989) 490 U.S. 680; *Goodall by Goodall v. Stafford County School Board* (4th Cir. 1995) 60 F.3d 168; *McCarthy v. Hornbeck* (D.Md. 1984) 590 F.Supp. 936.) Like the high court's decision in *Braunfeld, supra*, 366 U.S. 599, and unlike this case, none of them involved a government rule requiring an individual to act contrary to his or her religious beliefs in order to conduct the activity in question, and none of them presented a conflict between religious belief and secular command that could only be resolved by abandoning the activity in question. The absence of these crucial facts makes those cases of little relevance to the issue we address today, for here the state does require Smith to act contrary to her religious beliefs in conducting her chosen activity of renting her duplex units, and she can avoid that conflict only by abandoning the housing rental business.

Moreover, as explained in part III above, the United States Supreme Court's pre-*Smith, supra*, 494 U.S. 872, free exercise decisions on which RFRA is based demonstrate that a conflict between government laws and an individual's religious beliefs substantially burdens the exercise of religion in cases where the believer cannot avoid the conflict except by abandoning participation in the activity that gives rise to the conflict. Nor does anything in the text of RFRA or its legislative history remotely suggest that Congress intended to limit RFRA's scope only to cases of religiously compelled activities, and to require religious believers in other cases to abandon the activity in question in order to resolve the conflict

between their religious beliefs and the government law. (See Laycock, *RFRA, Congress, And The Ratchet* (1995) 56 Mont.L.Rev. 145, 151 ["The legislative history is clear that the conduct does not have to be compelled by religion."]; Laycock & Thomas, *Interpreting the Religious Freedom Restoration Act, supra*, 73 Tex.L.Rev. 209, 232-233.)

A number of cases decided since Congress enacted RFRA in 1993 further demonstrate that a conflict between a religious belief and a government rule that the adherent could avoid only by abandoning the activity in question amounts to a substantial burden on religion. In *Rourke v. New York State Department of Correctional Services* (N.D.N.Y. 1995) ___ F.Supp. ___, ___, [1995 WL 760717] a Native American correctional officer let his hair grow long as required by his religious beliefs but contrary to his government employer's rules. His religious beliefs did not compel him to work as a correctional officer; thus, as here, he could have avoided the conflict between his religious beliefs and the government mandate by abandoning the activity that gave rise to the conflict. The federal trial court nonetheless held that the employer's rule against long hair substantially burdened the exercise of the Native American correctional officer's religious beliefs. (*Id.* at p. ___ [1995 WL 760717, *14].)

In another case decided since congressional enactment of RFRA in 1993, the State of Wisconsin required that slow-moving vehicles like horse-drawn buggies display a fluorescent orange triangle to warn motorists of their presence. The Amish religion does not compel the Amish to use horse-drawn buggies to travel on the public highways. Their religion does require that, if they chose to do so, they not affix fluorescent orange triangles to their buggies, in keeping with their avoidance of colorful and worldly symbols. The Wisconsin Court of Appeals held that under RFRA the state's

requirement substantially burdened the exercise of religion by the Amish, even though their beliefs did not compel the activity that brought their beliefs into conflict with the law and they could avoid the conflict by abandoning the activity. (*State v. Miller* (Wis.Ct.App. 1995) 538 N.W.2d 573, 577, review granted (Wis. 1995) 540 N.W.2d 200; see also *State v. Hershberger* (Minn. 1989) 444 N.W.2d 282, 287, judg. vacated and cause remanded (1990) 495 U.S. 901, reinstated after remand (Minn. 1990) [applying the substantial burden test in a pre-RFRA case, the Minnesota Supreme Court reached the same conclusion].) Here, Smith's situation is no different, for the conduct compelled by her religious beliefs conflicts with the government's laws, and she could only avoid the conflict by abandoning the activity in question.

Two zoning cases decided under RFRA also demonstrate that a substantial burden exists if the only way of avoiding a conflict between religious belief and governmental mandate is to abandon the activity in question. These two cases held that particular zoning regulations prohibiting religious uses of property were substantial burdens on the exercise of religion, notwithstanding that the congregations owning the property could have avoided the conflict by selling the property and acquiring other property zoned for the uses they proposed: *The Jesus Center v. LC Farmington Hills Zoning Board of Appeals* (Mich.Ct.App. 1996) ___ N.W.2d ___ [1996 WL 14771]; and *Western Presbyterian Church v. Bd. of Zoning Adj.* (D.D.C. 1994) 862 F.Supp. 538, 545-546.[5] (Contra, *Daytona*

---

[5] These cases appear consistent with congressional intent. During the Senate floor debates, RFRA's cosponsor Senator Hatch pointed to a pre-RFRA zoning exclusion case, *Cornerstone Bible Church v. City of Hastings* (8th Cir. 1991) 948 F.2d 464, 472, which had held under the *Smith, supra*, 494 U.S. 872, standard of lessened scrutiny that the zoning regulations in question did not infringe the congregation's right to the free

Rescue Mission, Inc. v. City of Daytona Beach (1995) 885 F.Supp. 1554, 1560.)[6]

Finally, an example may serve to illustrate the untenability of the plurality opinion's position. The plurality opinion concludes in this case that landlord Smith's exercise of her religious beliefs is not substantially burdened by FEHA because she can avoid the conflict "without violating her beliefs or threatening her livelihood" (plur. opn., *ante,* at p. 37) by abandoning the housing rental business, because FEHA is a religion-neutral law that, at most, makes Smith's "religious

---

exercise of religion, as an example of the "serious[] ero[sion]" of religious freedom that RFRA would correct. Zoning regulations were also singled out in a similar vein in the remarks of cosponsor Senator Kennedy, in the House debates, and in the Senate Report. (Remarks of Sen. Hatch, 139 Cong. Rec. S14350-01, S14353 (daily ed. Oct. 26, 1993); remarks of Sen. Kennedy, 139 Cong. Rec. S14350-01, S14351 (daily ed. Oct. 26, 1993); remarks of Rep. Schumer, 139 Cong. Rec. H2356-03, 2360 (daily ed. May 11, 1993); remarks of Rep. Hoyas, *id.* at p. 2361; remarks of Rep. Maloney, *id.* at p. 2362; Sen. Rep. No. 103-111, 1st Sess., p. 8, *supra*, reprinted in 1993 U.S. Code Cong. & Admin. News 1892, 1897; see also written testimony of RFRA's original sponsor, Rep. Solarz, hearings on H.R. No. 2797 before the House Com. on the Judiciary, Subcom. on Civil and Const. Rights, 102d Cong., 2d Sess., ser. 99, at p. 122 (1992); Laycock, *RFRA, Congress, And The Ratchet, supra*, 56 Mont.L.Rev. 145, 146, 151.)

[6] Two decisions predating *Smith, supra*, 494 U.S. 872, further illustrate that conflicts between religious belief and government law are substantial burdens if they can only be avoided by abandoning the activity in question. In each case, laws requiring photographs on driver's licenses substantially burdened religious adherents whose beliefs forbade graven images, even though they could have avoided the conflict by not driving. (*Quaring v. Peterson* (8th Cir. 1984) 728 F.2d 1121, 1125, affd. by an equally divided ct. (1985) 472 U.S. 478; *Bureau of Motor Vehicles v. Pentecostal House of Prayer, Inc.* (1978) 269 Ind. 361, 367-368 [380 N.E.2d 1225, 1228-1229].)

exercise more expensive" (*ibid.*), and because granting Smith an accommodation "would necessarily impair the rights and interests of third parties" (*ibid.*). Under this reasoning, a law that all obstetricians must perform abortions when requested by their patients would not substantially burden the exercise of religion by a Catholic obstetrician who objects to abortion, and therefore would not be subject to any scrutiny under RFRA. Because Catholics need not be doctors and doctors need not be obstetricians, the obstetrician could avoid the conflict "without violating [the obstetrician's] beliefs or threatening [the obstetrician's] livelihood" (plur. opn., *ante*, at p. 37) by abandoning obstetrics and switching to another medical specialty. The law is a religion-neutral one that, at most, might make the obstetrician's "religious exercise more expensive" (*ibid.*) because of the expenses of switching specialties. To grant the obstetrician an accommodation "would necessarily impair the rights and interests of third parties" (*ibid.*), the obstetrician's patients who have a constitutional right to abortion. Notwithstanding the plurality opinion's reasoning, however, I have no doubt that Congress did not intend that such a law would escape all scrutiny under RFRA.

VI

My conclusion that in this case the state has substantially burdened landlord Smith's exercise of her religious beliefs does not mean that she is automatically entitled to an exemption from the requirement in state statutory law (FEHA) that she not discriminate on the basis of marital status. Under federal law (RFRA), a religious believer does not establish the right to an exemption simply by showing that the government has substantially burdened his or her religious beliefs. Satisfying RFRA's "substantial burden" threshold only shifts to the government the duty of justifying the substantial burden it has imposed on the believer's religious beliefs.

Hence, because requiring Smith to rent to cohabiting unmarried heterosexual couples substantially burdens her religious beliefs, it becomes necessary to address the question of whether the state has justified that requirement by proving it has a compelling governmental interest and that it has no less restrictive means for achieving that interest. As the text of RFRA states, the government (here, the Commission) must "demonstrate[] that application of the burden *to the person* [here, Smith] -- [¶] (1) is in furtherance of a compelling governmental interest; and [¶] (2) is the least restrictive means of furthering that compelling governmental interest." (42 U.S.C. § 2000bb-1(b), italics added.) I shall examine each of these requirements in succession.

On this record, it is questionable whether the Commission has carried its burden of proving there is a compelling governmental interest in eliminating discrimination against unmarried cohabiting heterosexual couples.[7] The Commission has failed to present any significant evidence on this point. Instead, the Commission argues that *all* forms of discrimination listed in FEHA and the Unruh Civil Rights Act, simply by being included in those statutes, are necessarily

---

[7] The issue raised by this case is the legitimacy of religiously motivated housing discrimination against unmarried *heterosexual* couples. My discussion of whether the state has carried its heavy burden of demonstrating a compelling state interest addresses only that issue. Analysis of whether there is a compelling interest in eliminating discrimination against homosexual couples may well involve different considerations; homosexual couples have been subject to a quite different, and continuing, history of discrimination; also, their unmarried status is not a matter of voluntary choice. (See *Gay Rights Coalition v. Georgetown Univ.* (D.C.App. 1987) 536 A.2d 1, 31-38 [determining under the District of Columbia Human Rights Act that there is a compelling governmental interest in eradicating discrimination against homosexuals].)

equally invidious, and that the state has an equally compelling interest in eliminating all of them.

This facile equation of all forms of discrimination simply because they are recited side by side in a statute is supported neither by history nor present social reality. There is no recent history or present practice of invidious discrimination against unmarried cohabiting heterosexual couples that is remotely comparable to the disgraceful and unhappy history of racial, ethnic, and gender discrimination. (See *Walnut Creek Manor v. Fair Employment & Housing Com., supra*, 54 Cal.3d 245, 276 (dis. opn. of Kennard, J.) [discussing persistence of racially and ethnically "[s]egregated housing patterns, which frequently confine minority groups to substandard housing"].) For that reason, deciding there is no compelling interest in ameliorating housing discrimination against unmarried heterosexual couples would not mean that there is no compelling interest in eliminating other forms of housing discrimination, such as racially motivated discrimination, even if based on religious beliefs. (Cf. *Bob Jones University v. United States* (1983) 461 U.S. 574, 604 [eliminating racial discrimination in education held to be a compelling governmental interest that justified the substantial burden that denying tax benefits to racially discriminatory university imposed on the religious organization that ran the university].)

Unmarried cohabiting heterosexual couples were relatively rare until the 1960's; once they appeared in significant numbers, whatever housing and employment barriers existed for them crumbled rapidly and almost completely. Twenty years ago, this court noted "the prevalence of nonmarital relationships in modern society and the social acceptance of them" and observed that moral considerations against cohabitation by unmarried heterosexuals "have apparently been so widely abandoned by so many." (*Marvin v.*

Marvin (1976) 18 Cal.3d 660, 683-684.) Furthermore, in the housing arena, the Legislature has authorized both public and private universities to discriminate in housing on the basis of marital status, permitting them to offer housing reserved for married students. (Gov. Code, § 12995, subd. (a)(2).) It is hard to see how the state can claim to have a compelling interest in eliminating from the private sector a form of discrimination that it expressly authorizes and practices in its own operations.

Other courts have also questioned whether eliminating housing discrimination against unmarried heterosexual couples has been shown to be a compelling governmental interest. (*Attorney General v. Desilets*, *supra*, 418 Mass. 316, 327 [636 N.E.2d 233, 239] ["marital status discrimination is not as intense a State concern as is discrimination based on certain other classifications"]; *State by Cooper v. French* (Minn. 1990) 460 N.W.2d 2, 10 [finding that state lacked a compelling interest in eliminating housing discrimination against unmarried heterosexual couples]; see also *Swanner v. Anchorage Equal Rights Commission* (1994) ___ U.S. ___, ___ [115 S.Ct. 460, 461] [Justice Thomas, dissenting from the denial of certiorari: "I am quite skeptical that Alaska's asserted interest in preventing discrimination on the basis of marital status is 'compelling' enough to satisfy [the] stringent standards [of *Sherbert, supra*, 374 U.S. 398, and *Wisconsin v. Yoder*, *supra*, 406 U.S. 205]."].)

One scholarly commentary has criticized the assertion made in this very case that eliminating housing discrimination against unmarried heterosexual couples is a compelling governmental interest: "California authorities are arguing . . . that states have a compelling interest in forcing conscientiously objecting landlords to rent apartments to unmarried couples. [They do not] mention[] any evidence that unmarried couples were actually having difficulty finding housing; without such

evidence, this claim of compelling interest is utterly frivolous. The stakes are entirely symbolic: sex outside of marriage has gone from misdemeanor to compelling interest in one generation, and religious believers who resist the change must be crushed. . . . [¶] If any such deferential view of compelling interest is read into RFRA, the congressional goal of protecting religious practice will be wholly defeated." (Laycock & Thomas, *Interpreting the Religious Freedom Restoration Act, supra*, 73 Tex.L.Rev. 209, 223-224.)

Ultimately, however, it is unnecessary to resolve the question of whether in this case the Commission has carried its burden of demonstrating that there is a compelling governmental interest in prohibiting housing discrimination against unmarried heterosexual couples or to address the privacy interests of Phillips and Randall that have also been advanced to justify the burden on Smith's religious beliefs. Even if the interest in preventing housing discrimination against unmarried cohabiting heterosexual couples were compelling, to prevail the Commission would have to demonstrate that the state could not advance this interest by a less restrictive means that would exempt Smith and other religious objectors from renting to such couples. This the Commission has not done. It has not shown that excepting landlords like Smith from housing laws would so reduce the stock of housing available to unmarried heterosexual couples, or otherwise be so infeasible, as to defeat or even substantially impair its goal of providing equal housing opportunities to unmarried heterosexual couples.

The Commission has not presented any evidence that unmarried heterosexual couples would face significant obstacles in finding housing if religiously based exemptions were granted. Both RFRA, which Congress enacted in 1993, and the case law it refers to make clear that it is the

government's burden to produce evidence that there are no less restrictive alternatives to denying exemptions to religious objectors. Mere speculation is not enough. Congress has specifically stated in RFRA that the government must "demonstrate[] that application of the burden to the person -- [¶] . . . [¶] . . . is the least restrictive means of furthering th[e] compelling governmental interest" (42 U.S.C. § 2000bb-1(b)); the statute defines "demonstrate[]" as meaning "meet[] the burdens of going forward with the evidence and of persuasion" (42 U.S.C. § 2000bb-2(3)).

The high court's decisions in this area illustrate the government's burden in proving that there are no less restrictive alternatives. In *Thomas v. Review Bd., Ind. Empl. Sec. Div., supra*, 450 U.S. 707, 718, the state unemployment compensation fund had argued that providing unemployment benefits to religious objectors who quit their jobs would result in "widespread unemployment and [a] consequent burden on the fund." The high court rejected this "what if everybody did it?" argument on the ground that "[t]here is no evidence in the record to indicate that the number of people who find themselves in the predicament of choosing between benefits and religious beliefs is large enough to create 'widespread unemployment' or even to seriously affect unemployment." (*Thomas v. Review Bd., Ind. Empl. Sec. Div., supra*, 450 U.S. at p. 719.) Earlier, in *Sherbert, supra*, 374 U.S. at page 407, the court had likewise rejected for lack of evidence the "possibility that the filing of fraudulent claims by unscrupulous claimants feigning religious objections to Saturday work might not only dilute the unemployment compensation fund but also hinder the scheduling by employers of necessary Saturday work."

Frazee v. Illinois Employment Security Dept., supra, 489 U.S. 829, was another unemployment benefits case, and the lower court had upheld the denial of the religious objector's

claim to benefits on the ground that "'chaos would result'" if, like the religious objector in that case, all Americans stopped working on Sundays for religious reasons. (*Id.* at p. 835.) The United States Supreme Court rejected this dire prophecy as lacking in evidentiary support. Quoting the passage from *Thomas v. Review Bd., Ind. Empl. Sec. Div., supra*, 450 U.S. at page 719, set forth above, the court concluded instead that "[a]s was the case in *Thomas* . . . there is nothing before us in this case to suggest that Sunday shopping, or Sunday sporting, for that matter, will grind to a halt as a result of our decision today." (*Frazee v. Illinois Employment Security Dept., supra*, 489 U.S. at p. 835.) So too, here, there is no evidence that granting religiously based exemptions to Smith and others like her would seriously deplete the stock of housing available to unmarried heterosexual cohabitants.

Moreover, in this case the religious beliefs of landlord Smith and others similarly situated are at odds with their economic self-interest, further reducing the probability that religious exemptions would seriously affect the housing market for unmarried heterosexual couples. In the case of religious objections to a tax or a claim for a religious exemption that expands a religious believer's entitlement to government benefits, religious belief aligns with economic self-interest. This confluence of religious and economic motives may in some cases encourage phony claims of religious conflict. Here, by contrast, Smith's sincerely held religious beliefs are contrary to her economic self-interest, for by excluding unmarried heterosexual couples she is artificially reducing demand, and thus the price she can command, for her rental housing. This further reduces the likelihood that there will be a mass movement of landlords seeking to refuse rentals on religious grounds to unmarried heterosexual couples.

Nor would it be administratively infeasible to grant

to her economic self-interest, for by excluding unmarried heterosexual couples she is artificially reducing demand, and thus the price she can command, for her rental housing. This further reduces the likelihood that there will be a mass movement of landlords seeking to refuse rentals on religious grounds to unmarried heterosexual couples.

Nor would it be administratively infeasible to grant exemptions to Smith and others similarly situated. Like an unemployment benefits system, California's housing discrimination laws create an administrative mechanism for individualized enforcement that is capable of assessing on a case-by-case basis claims of a federal statutory entitlement under RFRA to a religious exemption. Unemployment benefits systems typically provide for an administrative procedure by which the benefits claimant can be heard and present evidence, and by which the agency then renders an individualized determination of the claimant's eligibility for benefits. (E.g., *Frazee v. Illinois Employment Security Dept., supra*, 489 U.S. at pp. 830-831; *Hobbie v. Unemployment Appeals Comm'n of Fla., supra*, 480 U.S. at pp. 138-139; *Sherbert, supra*, 374 U.S. at pp. 399-401.) California's housing antidiscrimination laws are enforced by an analogous administrative procedure that provides for administrative hearings and an individualized determination of whether the landlord has discriminated in violation of the law. (Gov. Code, § 12980-12981.) A landlord who contends that religious beliefs prohibit him or her from renting to unmarried heterosexual couples can raise a RFRA defense in the hearing process. As occurred in this case, the hearing officer can take evidence and determine the sincerity of the landlord's professed beliefs, whether there is a conflict between those beliefs and the fair housing laws, whether the state has proven a compelling interest in eliminating the discriminatory conduct in question, and whether the state has shown there is no less restrictive alternative that would exempt

mandate in RFRA precludes the Commission from applying the state statute, FEHA, to Smith. (42 U.S.C. § 2000bb-1(a)-(c).) Like the plurality opinion, I find it unnecessary to decide whether the Unruh Civil Rights Act provides unmarried couples with a similar protection against discrimination, for even if it does, RFRA similarly bars its application to Smith. Also, given my conclusion that RFRA prohibits the Commission from applying FEHA to Smith, I need not address Smith's defenses under the federal and state Constitutions.[8]

VII

Finally, it is appropriate to discuss briefly the issue of the constitutionality of RFRA. In enacting RFRA, Congress relied on its power under section 5 of the Fourteenth Amendment to "enforce, by appropriate legislation" the constitutional rights secured by that amendment, which include freedom of religion. (Sen. Rep. No. 103-111, 1st Sess., pp. 13-14, *supra*, reprinted in 1993 U.S. Code Cong. & Admin. News 1892, 1903.) Some scholars are of the view that RFRA is unconstitutional, asserting that Congress has exceeded its

---

[8] Although Justice Baxter similarly concludes that in this case the Commission has substantially burdened the exercise of Smith's religious beliefs, he would remand the case for the Commission to apply the compelling governmental interest test instead of deciding whether the compelling governmental interest test requires that the state grant Smith an exemption. In my view, there is no necessity to remand this case. As discussed above, RFRA adopted the free exercise clause legal standard that had existed prior to *Smith, supra*, 494 U.S. 872. Because the hearing in this case occurred before *Smith* was decided, the standard adopted by RFRA was in effect at that time. Both the parties and the administrative law judge were fully aware of this standard, and the parties addressed it in presenting their evidence and argument. Application of the law to the record in this case is a task that this court can perform without remanding to Commission.

powers under section 5 of the Fourteenth Amendment by requiring in RFRA that states defer to the free exercise of religion to a greater degree than is constitutionally required under *Smith, supra*, 494 U.S. 872. (See, e.g., Conkle, *The Religious Freedom Restoration Act: The Constitutional Significance Of An Unconstitutional Statute* (1995) 56 Mont.L.Rev. 39; Hamilton, *The Religious Freedom Restoration Act: Letting The Fox Into The Henhouse Under Cover Of Section 5 Of The Fourteenth Amendment* (1994) 16 Cardozo L.Rev. 357; contra, Laycock, *RFRA, Congress, And The Ratchet, supra*, 56 Mont.L.Rev. 145 [explaining why RFRA is constitutional].)

Quite recently, however, the federal Court of Appeals for the Fifth Circuit has upheld the constitutionality of RFRA. (*Flores v. City of Boerne* (5th Cir. 1996) 73 F.3d 1352.) Three other courts have also reached this conclusion. (*State v. Miller, supra*, 538 N.W.2d 573, 577; *Sasnett v. Department of Corrections* (W.D.Wis. 1995) 891 F.Supp. 1305, 1315-1320; *Belgard v. State of Hawaii* (D.Hawaii 1995) 883 F.Supp. 510, 512-517.) Because no party has raised the issue, it is unnecessary to address in this case whether RFRA is a permissible exercise of Congress's authority under section 5 of the Fourteenth Amendment.

Randall acknowledges that RFRA is constitutional as a general matter but argues RFRA is unconstitutional as applied to this case if its application would exempt Smith from complying with the housing antidiscrimination mandate of FEHA and the Unruh Civil Rights Act. Randall claims that any such exemption cannot diminish Randall's rights under state and, he asserts, federal statutory law to be free of discrimination. This argument is meritless. Congress can enact a statute (here, RFRA) to diminish or qualify rights it has created in prior federal statutes just as it could repeal those

statutes directly. Nor is there any merit to Randall's argument that a law passed by Congress under section 5 of the Fourteenth Amendment cannot impinge on state laws to the contrary. If, as Randall concedes, Congress has the constitutional power to enact RFRA, then under the supremacy clause of the federal Constitution (U.S. Const., art. VI, § 2), RFRA prevails over state law to the contrary.

Justice Mosk relies on an altogether different ground to assert that RFRA is unconstitutional. He takes the view that under RFRA a court deciding whether the government has substantially burdened the exercise of a person's religious beliefs must determine to what degree the religious conduct in question is central to the person's religious beliefs, and that such an inquiry is constitutionally forbidden. (Conc. opn., *ante,* at pp. 3-4, 16.) RFRA, however, requires no such inquiry. Nothing in the text of RFRA or in its legislative history shows any indication that Congress intended that the substantial burden test apply only to religious conduct that is central to an adherent's beliefs. To the contrary, Congress rejected any centrality inquiry by adopting the pre-*Smith, supra*, 494 U.S. 872, free exercise clause case law. That case law had unequivocally rejected any inquiry into the centrality of religious practices in free exercise clause cases. (*Hernandez v. Commissioner, supra*, 490 U.S. 680, 699 [applying the substantial burden test while observing that "[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith"]; *United States v. Lee*, *supra*, 455 U.S. 252, 257; *Thomas v. Review Bd., Ind. Empl. Sec. Div., supra*, 450 U.S. 707, 715-716.)

Justice Mosk's argument rests on a footnote in the majority opinion in *Smith, supra*, 494 U.S. 872, 887 fn. 4. That footnote, however, does not purport to discuss the meaning of "substantial burden" established in cases prior to *Smith,* and

nowhere asserts that those cases had adopted an inquiry into the centrality of the adherent's religious beliefs. Rather, the footnote contends that it would be "unworkable" to apply the compelling interest test without also adopting a centrality test to limit the instances to which the compelling interest test applied. Elsewhere, the *Smith* court expressly acknowledged that its prior case law, the case law adopted by Congress in RFRA, had rejected any centrality test: "Repeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim." (*Smith, supra*, 494 U.S. 872, 887.) More fundamentally, regardless of the *Smith* court's views on the feasibility of a compelling interest test without a threshold centrality inquiry, in enacting RFRA Congress was not required to adopt those views. Nor did it, for, as discussed above, its incorporation of pre-*Smith* case law shows that Congress rejected any centrality inquiry.

CONCLUSION

"The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate." (Madison, Memorial and Remonstrance Against Religious Assessments (1785), reprinted in *Everson v. Board of Education* (1947) 330 U.S. 1, 64 (appen. to dis. opn. of Rutledge, J.).)

The freedom that James Madison championed -- the freedom not only to hold but also to freely exercise religious beliefs -- is a freedom older than our nation. For centuries, many have come to our shores seeking it. Our nation was founded by a people who valued it, and who enshrined it in the Constitution. In protecting this fundamental liberty by its 1993 enactment of the Religious Freedom Restoration Act, Congress expressly acted in the tradition of "the framers of the

Constitution, [who] recogniz[ed] free exercise of religion as an unalienable right, [and] secured its protection in the First Amendment to the Constitution." (42 U.S.C. § 2000bb(a)(1).)

Our society recognizes and fosters other values as well, however. Especially in recent years, our society has taken a strong stand against many forms of invidious discrimination. To balance the sometimes conflicting values of religious liberty and freedom from discrimination is not an easy task. In enacting RFRA, Congress struck the balance by requiring that a religious adherent be exempted from an antidiscrimination law that conflicts with the adherent's religious beliefs unless the government shows that application of the antidiscrimination law to the adherent and others similarly situated furthers a compelling governmental interest that cannot be advanced by any less restrictive alternative.

Applying to this case the congressional mandate expressed in RFRA, I would hold that in requiring that Smith comply with state statutory law by renting to unmarried heterosexual couples, the state substantially burdens Smith's religious beliefs by compelling her to do that which her beliefs forbid. On the record it created in this case, the state has failed to demonstrate that there are no alternatives that would allow it to pursue its goal of abolishing discrimination against unmarried heterosexual couples while granting case-by-case exemptions to landlords like Smith with religious objections. Accordingly, I would affirm the judgment of the Court of Appeal granting the writ of mandate.

BAXTER, J.; concurring and dissenting:

The California Fair Employment and Housing Act (FEHA; Gov. Code, section 12900 et seq.) on its face prohibits a landlord from discriminating against any individual on the basis of "marital status." (Gov. Code, § 12955, subds. (a), (d).) As will be explained, notwithstanding evidence of contrary original legislative intent, the statute has consistently been interpreted as prohibiting discrimination in housing accommodations against unmarried cohabiting heterosexual couples. Under settled principles of statutory construction, that interpretation must likewise obtain in this case.

The more difficult question presented is whether Congress's enactment in 1993 of the Religious Freedom Restoration Act (42 U.S.C. § 2000bb et seq., hereafter RFRA) - a federal statutory guarantee of religious liberty expressly and retroactively made applicable to cases such as this one - affords the landlord in this case a basis upon which to seek an individualized *exemption* from compliance with FEHA's prohibition against housing discrimination based on marital status, on the ground that to require her to rent an apartment to an unmarried cohabiting heterosexual couple would conflict with her sincerely held, fundamental religious beliefs.

Evelyn Smith, a widow who owns two duplexes (comprising four rental apartments) in Chico, and who derives her primary source of income from the rental units in question, refused to rent a vacant unit to an unmarried heterosexual couple, contrary to the aforementioned housing discrimination prohibition of FEHA. It is not contested that Smith so acted out of her firm and sincerely held Christian beliefs. The lead opinion effectively concludes that under no circumstance can the state statutory requirement that Smith offer to rent the vacant unit to the unmarried couple be found to "substantially

burden" her federal statutorily guaranteed fundamental right to free exercise of her religion. It is further concluded in the lead opinion that even under the mandate of RFRA, California need not demonstrate a "compelling state interest" in furtherance of the housing discrimination provision here in issue before refusing to grant Smith an exemption from it, notwithstanding the patent conflict between that state statutory provision and Smith's fundamental, federal statutorily guaranteed free exercise rights. Nor, under the lead opinion's rationale, need the state meet its burden under RFRA of demonstrating that FEHA's blanket prohibition against housing discrimination on the basis of marital status, as applied to Smith, is "the least restrictive means" by which to implement this particular antidiscrimination policy.

In short, the lead opinion concludes, purportedly under the balancing test mandated by RFRA and retroactively applicable to this case, that the state policy of prohibiting housing discrimination on the basis of marital status must always prevail, as a matter of law, over a landlord's right of free exercise of his or her religion - even where that policy is shown to conflict with the landlord's sincerely held religious beliefs. And in this case, if Smith does not like it, the plurality invites her to get out of the apartment rental business by selling her duplexes and "redeploying . . . [her] capital in other investments." (Lead opn., *ante*, at p. 29.)

I dissent. I would hold that the state must meet its burden under the mandate of RFRA of applying the compelling interest test to the particular facts of this case to determine whether the FEHA provision in question "substantially burdens" Smith's federal statutory right to free exercise of her religion, thereby entitling her to seek an individualized exemption from FEHA's requirement that she rent to the unmarried couple in question. Fundamentally, under the

supremacy clause of the federal Constitution (U.S. Const., art. VI, section 2), the provisions of RFRA must prevail over state law to the contrary.

On the record before us, the state has never directly been put to its burden of demonstrating, upon proper application of RFRA's balancing test, that FEHA's blanket prohibition against housing discrimination based on marital status is the "least restrictive means" of implementing a "compelling governmental interest" in furtherance of the statute's purpose, or whether petitioner is instead entitled to an individualized exemption from that provision based on the particular facts of this case. The Fair Employment and Housing Commission (Commission) exercised its power not to adopt the proposed decision of the administrative law judge who heard the matter, opted instead to hear the case itself on the existing record (Gov. Code, § 11517, subd.(c)), and ultimately concluded it had no power to address Smith's constitutional arguments in view of article III, § 3.5, of the California Constitution.[1] All of these proceedings were conducted during the years 1988 and 1989, well before RFRA's enactment and, indeed, prior to the high court's decision in *Employment Division, Ore. Dept. of Human Res. v. Smith* (1990) 495 U.S. 874, which prompted Congress to enact the remedial legislation. Because the specific procedures outlined in RFRA were not in effect at the time the FEHC heard this case and

---

[1] California Constitution, article III, § 3.5, provides in relevant part:

"An administrative agency, including an administrative agency created by the Constitution or an initiative statute, has no power: [¶] (a) To declare a statute unenforceable, or refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional . . . ."

found petitioner in violation of FEHA, I would reverse the judgment of the Court of Appeal with directions to remand this matter to the Commission for further proceedings consistent with the mandate of RFRA.

I

Petitioner Evelyn Smith (plaintiff below), a widow, is a member of the Bidwell Presbyterian Church in Chico. She owns two duplexes in Chico, comprising four rental units, the rents from which provide her primary source of income. Because of her religious conviction that sex outside of marriage is a sin, she refuses to rent to unmarried couples. Smith informs couples interested in renting her units that she prefers to rent to married couples. In all other respects her rental practices conform to the letter of the law. As the Commission found, "[Petitioner] has rented her units to single, divorced and widowed persons. [She] has no religious objection to renting to people who are single, divorced, widowed or married. [She] would not rent to anyone who engages in sex outside of marriage, whether they are single, divorced, widowed or married. [Petitioner] rents her units to people without regard to their race, color, national origin, ancestry, or physical handicap. [She] rents her units without regard to the religious beliefs of tenants. She does not know the religious background of most of her tenants because she never asks them and only knows if they volunteer the information. [Petitioner] has rented her units to males and females and does not discriminate on the basis of sex."

Complainants Kenneth Phillips and Gail Randall (real parties in interest below) are an unmarried couple. When they expressed an interest in renting one of petitioner's duplex units, petitioner informed them, as was her custom, that she preferred renting to married couples. Complainants then lied to Smith,

representing to her that they were married. Petitioner agreed to rent one of the duplex units to them, and complainants tendered a $150 deposit to secure it. Complainant Randall also falsely signed the lease agreement, "Gail Phillips."

Before moving into the duplex, complainant Phillips informed petitioner that in actuality he and Randall were not married. Petitioner told Phillips she could not rent to an unmarried cohabiting couple because that would violate her religious beliefs. She refused to rent to complainants and returned their security deposit. Petitioner would have rented the unit to complainants had they been married.

Petitioner refused to rent to complainants because of her religious conviction that sex outside of marriage is sinful; she believes she would be committing a sin if she rented to people who engage in nonmarital sex. Petitioner explained: "I believe it's a sin to have sex out of marriage, and if I rent to [complainants] I'm also contributing to their sin and it's a sin for me. I believe that I have to answer [for] that as long as I know it's a sin and if I am assisting them in committing the sin, then I'm guilty, also."

Randall and Phillips each filed separate complaints against petitioner with the Commission. The matter was heard by an administrative law judge. Petitioner argued that the relevant provisions of FEHA (Gov. Code, § 12955, subd. (a)) and the Unruh Civil Rights Act (Civ. Code, § 51) do not prohibit discrimination against unmarried couples in the first instance. She further argued that to require her to rent to an unmarried couple over her religious objections would violate her free exercise rights under the federal and state Constitutions. (U.S. Const., 1st Amend.; Cal. Const., art. I, § 4.) The administrative law judge rejected both arguments and issued a proposed decision in favor of Randall and Phillips.

by an administrative law judge. Petitioner argued that the relevant provisions of FEHA (Gov. Code, § 12955, subd. (a)) and the Unruh Civil Rights Act (Civ. Code, § 51) do not prohibit discrimination against unmarried couples in the first instance. She further argued that to require her to rent to an unmarried couple over her religious objections would violate her free exercise rights under the federal and state Constitutions. (U.S. Const., 1st Amend.; Cal. Const., art. I, § 4.) The administrative law judge rejected both arguments and issued a proposed decision in favor of Randall and Phillips.

The Commission thereafter exercised its discretion not to adopt the proposed decision, and to instead hear the case itself on the existing record. (Gov. Code, § 11517, subd. (c).) The Commission concluded it had no power to address Smith's constitutional arguments in view of the provisions of article III, § 3.5, of the California Constitution. (See *ante*, at p. 3, fn. 1.) It found that FEHA's prohibition of discrimination based on "marital status" does encompass discrimination against unmarried couples, and that the Unruh Civil Rights Act further prohibits all forms of arbitrary discrimination by business establishments, including discrimination against unmarried couples. The Commission ultimately ruled in favor of complainants, finding Smith had violated Government Code § 12955, subdivisions (a) and (d),[2] Civil Code section 51, and

---

[2] Government Code section 12955, subdivision (a) provides in relevant part:

"It shall be unlawful:
"(a) For the owner of any housing accommodation to discriminate against any person because of the race, color, religion, sex, *marital status*, national origin, ancestry, familial status, or disability of that person." (Italics added.) Government Code section 12955, subdivision (d) provides in relevant part: "It shall be unlawful: [¶] . . . [¶] (d) For any person subject to the provisions of Section 51 of the Civil Code, as that section applies to housing

The Commission awarded complainants out-of-pocket and emotional distress damages totalling $954.[4] Petitioner was ordered to "cease and desist" marital status discrimination. She was further ordered to post in her rental units for a period of 90 days a notice announcing that she had been adjudicated in violation of FEHA for refusing to rent to prospective tenants because they were an unmarried couple. She was also ordered to permanently post in her rental units a notice to rental applicants of their rights and remedies under FEHA generally, and specifically with regard to discrimination against unmarried couples. Petitioner was ordered to personally sign both notices, and to provide copies to each person thereafter who expressed interest in renting from her.

Smith sought a petition for writ of mandate in the Court of Appeal. That court granted relief and reversed the ruling of

---

no matter what their sex, race, color, religion, ancestry, or national origin are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever. This section shall not be construed to confer any right or privilege on a person which is conditioned or limited by law or which is applicable alike to persons of every sex, color, race, religion, ancestry, or national origin." (Stats. 1974, ch. 1193, section 1, p. 2568.)

Government Code section 12948 provides: "It shall be an unlawful practice under this part for a person to deny or to aid, incite, or conspire in the denial of the rights created by Section 51 or 51.7 of the Civil Code."

[4] A component of the emotional distress damages found by the Commission was that plaintiff's refusal to rent to complainants "revived for complainant Randall the pain of her parents' disapproval of her living with complainant Phillips." Randall was awarded $300 for this emotional trauma. Phillips was awarded $200. On appeal, the Commission concedes it was without the power to award such damages. (See *Walnut Creek Manor v. Fair Employment & Housing Com.* (1991) 54 Cal.3d 245, 251, 267.)

the Commission. The Court of Appeal implicitly held that unmarried couples such as complainants came within the protection of the housing discrimination provision here in issue in the first instance. (Gov. Code, § 12955, subd.(a).) The court went on to hold that Smith's free exercise rights under the federal and state Constitutions (U.S. Const., 1st Amend.; Cal. Const., art. I, § 4) took precedence over the state statute's commands. It is noteworthy that the Court of Appeal filed its opinion in this case in May of 1994, only six months after the date on which RFRA became effective (November 16, 1993). (42 U.S.C. § 2000bb-3(a).) Although the Court of Appeal purported to invoke the provisions of RFRA in partial support of its holding, the appellate court did not place principal reliance on that federal statute, and instead reached its conclusions under the case law interpreting the free exercise clauses of the federal and state Constitutions.

II

At the threshold, I concur in the plurality's conclusion that the provisions of FEHA with which we are here primarily concerned - Government Code section 12955, subdivision (a) - must be construed as prohibiting discrimination in housing accommodations against unmarried cohabiting heterosexual couples. I would observe, however, that the Legislature's enactment of the pertinent statutory amendments may not have been originally intended to so broadly extend the proscription against housing discrimination to all such persons.

The language prohibiting discrimination "because of . . . marital status" (Gov. Code, § 12955, subd. (a)) derived from the California Fair Housing Act of 1963, commonly known as

the Rumford Act (former Health & Saf. Code, § 35720).[5] As originally enacted, the Rumford Act did not refer to "marital status." (Stats. 1963, ch. 1853, § 2, p. 3824.) After several failed attempts in the Legislature to amend the act to add prohibitions against housing discrimination on the basis of "sex" and "marital status," among other statuses, the Legislature, during its 1974-1975 Regular Session, enacted Senate Bill No. 844, which amended the Rumford Act to add both "sex" and "marital status" to the list of prohibited grounds of housing discrimination without any further definition of those terms. Thus, as of 1975, the Rumford Act barred housing discrimination on the basis of "race, color, religion, sex, marital status, national origin, or ancestry." (Former Health & Saf. Code, § 35720, subd. 1, as amended by Stats. 1975, ch. 1189, § 3, p. 2943.)

The statutory provisions prohibiting housing discrimination were transmuted into their present form when the Legislature enacted FEHA in 1980, combining in one scheme both the Rumford Act and the Fair Employment Practices Act (former Lab. Code, § 1411 et seq.). In that process, the Legislature repealed former Health and Safety Code section 35720 and reenacted its provisions in new Government Code section 12955. (Stats. 1980, ch. 992, § 4, p. 3154.) Although the new section applied more broadly to all classes of accommodations, it continued without change the prior statutory list of prohibited grounds of housing discrimination.

The available legislative history of Senate Bill No. 844

---

[5] For the antidiscrimination laws preceding the Rumford Act and their construction by this court, see Comment, *The Rumford Fair Housing Act Reviewed* (1964) 37 So.Cal.L.Rev. 427, 430-434.

includes staff reports by various state agencies (e.g., the Department of Housing and Community Relations, the Fair Employment Practices Commission) and legislative committees (e.g., the Assembly Committee on Housing and Community Development, and the Assembly Ways and Means Committee). In addition to analyzing the background, terms, and effects of the bill, these reports generally recite the purposes that the bill sought to serve. In construing a statute, of course, we may consider "the ostensible objectives to be achieved." (*People v. Woodhead* (1987) 43 Cal.3d 1002, 1008.)

It appears from these materials that Senate Bill No. 844 was largely intended to combat housing discrimination against unmarried women, and to a lesser extent unmarried men, based on unwarranted stereotypical beliefs that a single person is both a greater credit risk and a greater security risk than a married person. The legislative record identifies several such beliefs. First, there is the stereotype that unmarried men or women are less financially responsible than married persons, and hence are more likely to default in their obligations to make rent or mortgage payments; this stereotype is stronger in the case of unmarried women than men, and strongest for divorced women or women who are single heads of households. Second, there is the stereotype that the traditional nuclear family is a more stable social unit, and hence that unmarried men or women are more likely than married persons to disturb the peace of the premises. Third, there are two stereotypes aimed particularly at unmarried women: the belief that unmarried female tenants attract "drop-in" or "live-in" men, thus creating an undesirable climate on the premises; and the belief that unmarried female tenants lack the physical ability or skills to properly maintain the premises.

Noticeably absent from this legislative history of the relevant predecessor statutory enactments to Government Code

section 12955 is any persuasive evidence that the addition of the term "marital status" was intended to prohibit housing discrimination against unmarried cohabiting heterosexual couples as such. The foregoing notwithstanding, the plurality offers sufficiently persuasive countervailing reasons why the pertinent FEHA provisions should today be construed as prohibiting housing discrimination against unmarried cohabiting heterosexual couples.

When interpreting a statute, we normally look first to its plain language, attributing to those words their usual and ordinary meaning. (*DaFonte v. Up-Right, Inc.* (1992) 2 Cal.4th 593, 601.) Smith ultimately refused to rent to Randall and Phillips when she learned they were not married. Government Code section 12955, subdivision (a) makes it "unlawful . . . [¶] . . . [f]or the owner of any housing accommodation to discriminate against any person because of the . . . marital status . . . of that person." The ordinary meaning and use of that term logically encompasses both married and unmarried persons, and it would therefore appear that Smith's actions violated the letter of FEHA.

Moreover, since the enactment of FEHA in 1980, the Commission has apparently consistently interpreted Government Code section 12955, subdivision (a) as applying to unmarried cohabiting couples. So too have at least two California appellate decisions (*Hess v. Fair Employment & Housing Com.* (1982) 138 Cal.App.3d 232; *Atkisson v. Kern County Hous. Auth.* (1976) 59 Cal.App.3d 89, 99-100), one of which was cited twice by this court with approval (see *Robbins v. Superior Court* (1985) 38 Cal.3d 199, 213 [citing *Atkisson* for the proposition]; *Committee to Defend Reproductive Rights v. Myers* (1981) 29 Cal.3d 252, 264, fn. 10 [same].) Nor has the Legislature ever acted to amend Government Code section 12955, subdivision (a) in the face of this long-standing and

well-publicized construction of its terms, which strongly suggests legislative aquiescence in the judicial interpretation of the statute. (*Robinson v. Fair Employment & Housing Com.* (1992) 2 Cal.4th 226, 235.)

I therefore agree with the plurality's conclusion that the provisions of FEHA here in issue must be interpreted as prohibiting discrimination in housing accommodations against unmarried cohabiting heterosexual couples. The foregoing legislative history, however, will serve to further characterize the nature of the rights which this particular provision of FEHA was intended to protect. (*Post*, at pp. 34-37.) As will be seen, where the statutory provision conflicts with and substantially burdens petitioner's fundamental right of free exercise of religion, such a characterization gains importance in seeking to determine, under RFRA's mandated balancing test, whether the state can meet its burden of demonstrating the statute is the "least restrictive means" of implementing a "compelling governmental interest" in furtherance of the statute's purpose, such as will outweigh petitioner's federal statutorily guaranteed right to an exemption from its proscriptions.

III

In *Employment Division, Ore. Dept. of Human Res. v. Smith, supra*, 494 U.S. 872 (*Smith*), a sharply divided United States Supreme Court held that members of the Native American Church were not constitutionally entitled to ingest peyote as part of their religion's sacrament in the face of an Oregon law outlawing the use of peyote. (*Id.* at p. 890.) In so holding, the opinion for the court distinguished freedom of religious belief from freedom to act in strict conformance with one's religious scruples. The opinion further distinguished what may be characterized as laws "directed at religion" from neutral laws that merely prescribe or proscribe conduct, but

nonetheless conflict in some fashion with behavior driven by religious beliefs. *Smith* held that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" (*Id.* at p. 879, quoting *United States v. Lee* (1982) 455 U.S. 252, 263, fn. 3 (conc. opn. of Stevens, J.).)

It is beyond dispute that *Smith, supra*, 494 U.S. 872, marked a radical departure from free exercise jurisprudence to the extent its holding redefined the constitutional parameters of religious exemptions. Prior to *Smith*, the high court's cases interpreting the First Amendment's guarantee of free exercise of religion had granted extensive protection to religious liberty through application of the "compelling interest" test. Under that test, the government could not pass or enforce any law that burdened the exercise of religion unless the law's operative effect was the least restrictive means of attaining the compelling state interest which the law was enacted to further. The compelling interest test (or "compelling state interest" or "compelling governmental interest" test) was first announced by the court in *Sherbert v. Verner* (1963) 374 U.S. 398 (see also *Wisconsin v. Yoder* (1972) 406 U.S. 205).

In *Smith, supra*, 494 U.S. 872, the high court effectively abandoned the compelling interest test. Under the holding of *Smith*, the free exercise clause of the federal Constitution does not exempt the believer from compliance with the challenged law, no matter how great a burden the law imposes on the believer's religious beliefs or conduct, so long as the law is one of "'valid and neutral . . . general applicability.'" (494 U.S. at p. 879.)

The decision in *Smith, supra*, 494 U.S. 872, was met

with near universal condemnation by members of Congress, religious leaders, religious interest groups, and academics alike. The reaction of Congressman Stephen J. Solarz, who was RFRA's initial sponsor, is illustrative: "[W]ith the stroke of a pen, the Supreme Court has virtually removed religious freedom from the Bill of Rights."[6] Law review articles and notes were nearly unanimous in condemning the rationale and holding of *Smith*.[7] One commentator who agreed with the outcome of *Smith* nevertheless opined that the high court's decision "exhibits only a shallow understanding of free exercise jurisprudence and its use of precedent borders on fiction." (Marshall, *In Defense of Smith and Free Exercise Revisionism* (1991) 58 U.Chi.L.Rev. 308, 309 [describing the purpose of his article as an attempt to defend *Smith*'s rejection of the

---

[6] Religious Freedom Restoration Act of 1990: Hearings on House Bill No. 5377 before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 101st Congress, Second Session (1990), page 18 (statement of Rep. Stephen J. Solarz).

[7] See, e.g., Smith, Note, *The Criminalization of Belief: When Free Exercise Isn't* (1991) 42 Hastings L.J. 1491; Gordon, *Free Exercise on the Mountaintop* (1991) 79 Cal.L.Rev. 91; Delaney, *Police Power Absolutism and Nullifying the Free Exercise Clause: A Critique of Oregon v. Smith* (1991) 25 Ind.L.Rev. 71; McConnell, *Free Exercise Revisionism and the Smith Decision* (1990) 57 U.Chi.L.Rev. 1109; Rebescher, *Note, The Illusory Enforcement of First Amendment Freedom: Employment Division, Department of Human Resources v. Smith and the Abandonment of the Compelling Governmental Interest Test* (1991) 69 N.C.L.Rev. 1332; Rawlings, Comment, *Employment Division, Department of Human Resources v. Smith: The Supreme Court Deserts the Free Exercise Clause* (1991) 25 Ga.L.Rev. 567; Anderton, Comment, *Just Say No to Judicial Review: The Impact of Oregon v. Smith on the Free Exercise Clause* (1991) 76 Iowa L.Rev. 805; Marin, Note, *Employment Division v. Smith: The Supreme Court Alters the State of Free Exercise Doctrine* (1991) 40 Am.U.L.Rev. 1431.)

compelling interest test "without defending *Smith* itself."].)

Plainly, the opinion in *Smith, supra*, 494 U.S. 872, was viewed by many as reflecting the high court's abandonment of all traditional protection of religious liberty. A large number of individuals, scholars, and religious groups joined together in a futile effort to petition the high court for a rehearing.[8] Congress then set out to overturn the effect of the decision in *Smith*.

RFRA was first introduced by Congressman Stephen J. Solarz on July 26, 1990. (H.R. No. 5377, 101st Cong., 2d Sess. (1990).) The same bill was introduced in the Senate on October 26, 1990, by cosponsoring Senators Biden, Hatch, Inouye, Kennedy, Lieberman, Metzenbaum, Moynihan and Specter. (Sen. No. 3254, 101st Cong., 2d Sess. (1990).) A second version of the bill was introduced, again by its chief sponsor, Congressman Solarz, on June 26, 1991 (H.R. No. 2797, 102d Cong., 1st Sess. (1991)), and reintroduced in the Senate by Senator Edward Kennedy (Sen. No. 2969, 102d Cong., 2d Sess. (1992)). The final version of the bill, which ultimately became law (H.R. No. 1308, 103d Cong., 1st Sess. (1993); Sen. No. 578, 103d Cong., 1st Sess. (1993)), differed from the original bill in several important respects. Among them, a section entitled "Congressional Findings and Declaration of Purposes," which had been added in the second version, was retained and further amended in the final version of the bill. A section from

---

[8] The petition for rehearing in *Smith* was subscribed to by public interest groups such as the American Civil Liberties Union, numerous religious interest groups (including Baptist, Catholic, Jewish, Lutheran, Evangelical, Unitarian and Seventh Day Adventist groups), as well as an unprecedented coalition of over 50 law professors, among them Gerald Gunther of Standford, Laurence Tribe of Harvard, Kent Greenawalt of Columbia, and Michael McConnell of Chicago. (*Smith, supra*, 494 U.S. 872, rehg., den. (1990) 496 U.S. 913 (Dock. No. 88-1213).)

the original bill that had defined the term "person" as used in the act, and ostensibly would have allowed individuals and religious organizations, corporations or associations to bring suit under the act, was deleted from the second version, and likewise omitted from the final version of the bill which became law.

Bipartisan support for the enactment of RFRA in both houses of Congress was overwhelming. The final version of RFRA was introduced in the Senate by Senators Edward Kennedy and Orrin Hatch, and was cosponsored by 55 Senators. (139 Cong. Rec. S14461-01, S14471 (daily ed. Oct. 27, 1993).) There were over 190 cosponsors of the predecessor bill in the House of Representatives; the final version passed in that house of Congress without opposition. (139 Cong. Rec. H2356-03, H2363 (daily ed. May 11, 1993); 139 Cong. Rec. H8713-04, H8715 (daily ed. Nov. 3, 1993).) The Coalition for the Free Exercise of Religion, formed for the specific purpose of supporting passage of RFRA, was comprised of more than 35 organizations representing widely diverse religious and political groups and viewpoints, among them the American Civil Liberties Union, the American Jewish Congress, Concerned Women for America, the Baptist Joint Committee on Public Affairs, the National Association of Evangelicals, and the Native American Rights Fund, to name a few. (See Religious Freedom Restoration Act of 1990: Hearings on H.R. No. 5377 before House Com. on Judiciary, Subcom. on Civil & Constitutional Rights, 101st Cong., 2d Sess. (1990) at pp. 61-62.)

It is clear beyond cavil that RFRA was enacted for the express purpose of restoring the level of protection for religious freedom that existed prior to the high court's decision in *Smith*. As the court noted in *Hunafa v. Murphy* (7th Cir. 1990) 907 F.2d 46, 48, "*Smith* cut back, possibly to minute dimensions,

the doctrine that requires government to accommodate . . . minority religious preferences[.]" (See also *Yang v. Sturner* (D.R.I. 1990) 750 F.Supp. 558, 560 ["One must wonder . . . what is left of Free Exercise jurisprudence when one can attack only laws explicitly aimed at a religious group."]; see also *Smith, supra*, 494 U.S. at p. 908 (dis. opn. of Blackmun, J.) [*Smith* "effectuates a wholesale overturning of settled law concerning the Religion Clauses of our Constitution."]; and see *Church of Lukumi v. Hialeah* (1993) 508 U.S. __ [124 L.Ed.2d 472, 512, 113 S.Ct. 2217] (conc. opn. of Souter, J.) [describing the hybrid distinction posited in *Smith* as unworkable and "ultimately untenable"].)

It is equally clear that RFRA,[9] which applies retroactively to all cases pending at the time of its enactment (42 U.S.C. § 2000bb-3(a)), including this case, was purposefully intended to reverse the impact of the high court's decision in *Smith, supra*, 495 U.S. 872, by creating a statutory right requiring the compelling interest test to be applied in all cases in which the free exercise of religion has been burdened

---

[9] Title 42 United States Code section 2000bb-1 states:
"(a) IN GENERAL.-Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).
"(b) EXCEPTION.-Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person-
"(1) is in furtherance of a compelling governmental interest; and
"(2) is the least restrictive means of furthering that compelling governmental interest.
"(c) JUDICIAL RELIEF.-A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution."

by a law of general applicability.

That Congress intended RFRA to restore First Amendment free exercise jurisprudence to that which existed prior to *Smith* is clear from the following report of the House Judiciary Committee: "For many years and with very few exceptions, the Supreme Court employed the compelling governmental interest test [in deciding free exercise claims]. The *Smith* majority[']s abandonment of strict scrutiny represented an abrupt, unexpected rejection of long-standing Supreme Court precedent. . . . [¶] The effect of the *Smith* decision has been to subject religious practices forbidden by laws of general applicability to the lowest level of scrutiny employed by the courts. Because the 'rational relationship test' only requires that a law must be rationally related to a legitimate state interest, the *Smith* decision has created a climate in which the free exercise of religion is continually in jeopardy . . . . [¶] It is the Committee[']s expectation that the courts will look to free exercise of religion cases decided prior to *Smith* for guidance in determining whether or not religious exercise has been burdened and the least restrictive means have been employed in furthering a compelling governmental interest. . . . Therefore, the compelling governmental interest test should be applied to all cases where the exercise of religion is substantially burdened; however, the test generally should not be construed more stringently or more leniently than it was prior to *Smith*." (H.R.Rep. No. 103-88, 103d Cong., 1st Sess. (1993) at pp. 3, 6, 7; and see *id.* at p. 15 ["[T]he purpose of the statute is to 'turn the clock back' to the day before *Smith* was decided."].)

It is against this backdrop of the high court's decision in *Smith, supra*, 495 U.S. 872, and the groundswell of opposition to that decision, culminating in Congress's enactment of remedial legislation to reverse its impact on the traditional

protections of religious liberty, that I turn next to the rationale of the lead opinion.

The lead opinion first analyzes petitioner's free exercise claim under the First Amendment, and it is concluded that "[t]he First Amendment does not support Smith's claim." (Lead opn., *ante*, at p. 17.) Principal reliance is placed on the holding in *Smith, supra*, 494 U.S. 872, and in particular, the passage in that case holding that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" (Lead opn., *ante*, at p. 17, quoting *Smith, supra*, 494 U.S. at p. 879.)

The lead opinion reflects a clear understanding of the import of the high court's decision in *Smith, supra*, 494 U.S. 872. The plurality acknowledges that "in [*Smith*], the high court *abandoned balancing* as a way of adjudicating religiously motivated challenges to generally applicable laws." (Lead. opn., *ante*, at p. 20, italics added; see conc. opn. of Mosk, J., *ante*, at p. 3 ["The *Smith* court all but declared the 'compelling government interest' test to be 'utterly unworkable' . . . ."].) The lead opinion further acknowledges that in *Smith* the high court "[r]epudiat[ed] the balancing test set out in such cases as *Sherbert v Verner, supra*, 374 U.S. 398, and *Wisconsin v. Yoder, supra*, 406 U.S. 205 . . . ." (Lead opn., *ante*, at p. 20.)

In proceeding to analyze petitioner's free exercise claim under RFRA, the lead opinion acknowledges that RFRA was enacted for the express purpose of reversing the impact of *Smith, supra*, 494 U.S. 872, and restoring the compelling interest test. (Lead opn., *ante*, at p. 23.) It is further explained that prior to *Smith*, the high court's cases applying the compelling interest test required a critical threshold showing,

to wit, that the statute challenged be shown to "substantially burden" the religious beliefs of the person asserting its provisions violated his free exercise rights under the First Amendment, and that "Congress pointedly retained the threshold requirement in RFRA." (*Id.* at p. 27.) Nor are there any factual conclusions drawn in the lead opinion at odds with the obvious "burden" that will result if petitioner is required to comply with the provision of FEHA here in question. In essence, she will be required to either (1) violate her religious beliefs, by having to rent to unmarried couples, (2) refuse to comply with the law, and thereby incur statutory penalties, which, I would note, include increasingly severe criminal penalties for continuing violations, or (3) get out of the apartment rental business.

Notwithstanding the clear commands of the compelling interest test mandated under RFRA, and the "substantial burden" that looms plain and clear when that threshold requirement is applied to the facts of this case, the lead opinion concludes as follows: "In summary, these are the facts on which we must decide whether [petitioner] should be exempt from the antidiscrimination provisions of FEHA: [Petitioner's] religion does not require her to rent apartments, nor is investment in rental units the only available income-producing use of her capital. Thus, she can avoid the burden on her religious exercise without violating her beliefs or threatening her livelihood. (Citations.) The asserted burden is the result not of a law directed against religious exercise, but of a religion-neutral law that happens to operate in a way that makes [petitioner's] religious exercise more expensive. (Citations.) Finally, to grant the requested accommodation would not affect [petitioner] alone, but would necessarily impair the rights and interests of third parties. (Citation.) [¶] This set of facts does not, under the relevant case law, support [petitioner's] argument that requiring her to comply with FEHA's antidiscrimination

provisions substantially burdens her religious exercise. Accordingly, we have no occasion to determine whether application of the statute to her furthers a compelling state interest or is the least restrictive means to further such an interest." (Lead opn., *ante*, at pp. 36-37.)

The lead opinion's characterization of the compelling interest test mandated under RFRA, and its determination to truncate application of that test to this case because the "substantial burden" requirement assertedly could never be met on facts such as are before us, is simply flawed. True, "in enacting RFRA, Congress did not attempt to define a 'substantial burden.'" (Lead opn., *ante*, at p. 27.) True, the legislative history reflects Congress expected courts would look to the free exercise cases decided prior to *Smith, supra*, 494 U.S. 872, to determine whether the exercise of religion has been substantially burdened. (Lead opn., *ante*, at pp. 27-28.)

But these observations are only accurate insofar as Congress plainly, and expressly, directed through RFRA that the compelling interest test, *a balancing test* first announced in the pre-*Smith* seminal case of *Sherbert v Verner, supra*, 374 U.S. 398, and thereafter applied without exception to free exercise claims for nearly three decades (see also *Wisconsin v. Yoder*, *supra*, 406 U.S. 205), should henceforth be applied to such claims as a matter of federal statutory right. It is the rule of those pre-*Smith* cases and their progeny - that the compelling interest test be applied whenever government seeks to substantially burden a person's exercise of religion, even if the burden results from a rule or law of general applicability - that RFRA commands must henceforth be applied to free exercise claims. Surely Congress did not intend to resurrect through RFRA the interpretation of the pre-*Smith* decisions which the high court in *Smith* placed on them to reach its holding *abandoning* the compelling interest test.

I view the lead opinion's conclusions, summarized above, as virtually indistinguishable from the rationale and holding of *Smith, supra*, 494 U.S. at p. 879, in which case the high court concluded that the free exercise clause of the federal Constitution does not exempt the believer from compliance with a challenged law, no matter how great a burden the law imposes on the believer's religious beliefs or conduct, so long as the law is one of "'valid and neutral . . . general applicability.'" It is this central theme and holding of *Smith* that was so plainly, expressly, and thoroughly repudiated through the enactment of RFRA.

The seminal case relied on in the lead opinion is *Braunfeld v. Brown* (1961) 366 U.S. 599. But the holding in that case is inapposite to the facts at hand. In *Braunfeld*, Orthodox Jewish shopkeepers were required by their religious scruples to close their shops on Saturdays, their Sabbath. They were also subject to the challenged Sunday closing law which required them to keep their shops closed on Sundays. They urged that the Sunday closing law violated their free exercise rights because the effect of that law, taken together with the command of their Orthodox Jewish faith that their shops remain closed on Saturdays, resulted in the closure of their businesses for two days a week, whereas other merchants were only required to close their shops one day a week (Sunday). The high court rejected the shopkeepers' claim because nothing in Orthodox Judaism prohibited them from complying with the challenged law requiring them to close their shops on Sundays. The burden on the Orthodox Jewish shopkeepers was not "substantial" because nothing about their religious beliefs prevented them from complying with the Sunday closing law.

Petitioner has never claimed her religion compels her to participate in the business of renting apartments. Nor is that factor alone conclusive of the issue at hand. Although the

question whether the believer's religion compels the conduct that stands in conflict with the challenged statute is a relevant and important one, it is not determinative of the "substantial burden" inquiry we make under the compelling interest test. The Orthodox Jewish shopkeepers in *Braunfeld* did not claim their religious beliefs prevented them from complying with the Sunday closing law, much less prevented them from pursuing their livelihood as shopkeepers. Nor, for that matter, did the United States Supreme Court in *Braunfeld* directly extend an invitation to the shopkeepers, who were petitioning the court to secure their fundamental right to free exercise of their religion, to get out of the business of being merchants.

Here, petitioner's firm and sincerely held religious beliefs *do* prevent her from renting to unmarried cohabiting heterosexual couples. Unlike the shopkeepers in *Braunfeld,* here petitioner's religious beliefs *do* conflict with, and require her to violate, the provision of FEHA in issue as long as she continues to offer her units for rent to the public. I would commend to the plurality the high court's cautionary remarks in *Wisconsin v. Yoder*, *supra*, 406 U.S. 205, 220, to the effect that "belief and action cannot be neatly confined in logictight compartments," and those of Justice Sandra Day O'Connor in her concurring opinion[10] in *Smith, supra*, 494 U.S. 874, 893, to wit, "Because the First Amendment does not distinguish between religious belief and religious conduct, conduct motivated by sincere religious belief, like the belief itself, must therefore be at least presumptively protected by the Free

---

[10] It should be noted that Justice O'Connor did not join the rationale of the majority in *Smith*, but instead concurred on separate grounds. She would have applied the compelling interest test, but concurred in the judgment because she believed the petitioners would still lose under that test. (*Smith, supra*, 494 U.S. at pp. 905-907 (conc. opn. of O'Connor, J.).)

Exercise Clause."

I am particularly persuaded by that portion of the analysis set forth in Justice Kennard's concurring and dissenting opinion, wherein she explains that "*Braunfeld* . . . represented only the first step by the United States Supreme Court in the development of its modern free exercise clause jurisprudence, not its full flowering." (Conc. and dis. opn. of Kennard, J., *ante*, at p. 21.) Justice Kennard quotes various academics and commentators in support of this viewpoint, one of whom pointedly observed that the high court, in *Sherbert v Verner, supra*, 374 U.S. 398, "abandoned *Braunfeld's* distinction between direct and indirect impacts on religious conduct, and afforded religious action a level of constitutional protection that it had not before enjoyed." (Conc. & dis. opn. of Kennard, J., *ante*, at p. 21, quoting Choper, *The Rise and Decline of the Constitutional Protection of Religious Liberty* (1991) 70 Neb.L.Rev. 651, 655.)

To this line of reasoning I would add a further observation. In paraphrasing RFRA's "compelling governmental interest" test to be applied in cases in which a law of general applicability is asserted to burden the claimant's free exercise of religion, the lead opinion points to authorities setting forth the threshold requirement that "[t]he burden must fall on a religious belief rather than on a philosophy or a way of life." (Lead opn., *ante*, at p. 24, citing *Wisconsin v. Yoder, supra*, 406 U.S. 205, 215-219; *Thomas v. Review Bd., Ind. Empl. Sec. Div.* (1981) 450 U.S. 707, 713-718; *Werner v. McCotter*(10th Cir. 1995) 49 F.3d 1476, 1480, fn. 1; and *Thiry v. Carlson* (D.Kan. 1995) 887 F.Supp. 1407, 1412.) It seems to me the "burden" may, and often does, fall on both the believer's religious beliefs, and one or more aspects of his "way of life." In reviewing the rationale of the lead opinion, it strikes me that the justices subscribing to it are seemingly choosing to focus,

not on petitioner's sincere affirmation that compliance with the provision of FEHA in question will burden her firmly held religious beliefs, but instead *solely* on the manner in which her compliance with the statutory provision will impact her *economic* "way of life." Although the extent of the "economic" burden a challenged statute imposes on the believer is clearly a factor that can be weighed in evaluating the sincerity of the claimed need for a religious exemption, it is not determinative of the question of "substantial burden" where, as here, it can be shown that compliance with the law *conflicts* with the believer's fundamental religious beliefs. Indeed, this case well illustrates the point, for as will be explained, petitioner's economic interest in securing tenants for her vacant units is in actuality at odds with her religious beliefs, which serve to limit her pool of prospective lessees. In this sense too then, I believe the subscribers to the lead opinion lose sight of the full mandate of RFRA to apply a true balancing test to free exercise laims.

Finally, the subscribers to the lead opinion err when they meld the "compelling governmental interest" and "least restrictive means" inquiries into the threshold "substantial burden" inquiry. The lead opinion cautions that: "were we to grant the requested accommodation, [petitioner] would have more freedom and greater protection for her own rights and interests, while Phillips and Randall would have less freedom and less protection." (Lead opn., *ante*, at p. 36.) But such is not a conclusion of law to be determined on speculation by this court. The balancing of rights and interests, and the determination whether the blanket prohibition of housing discrimination based on marital status is the "least restrictive means" of implementing the "compelling governmental interest," if any, behind Government Code section 12955, is a matter of proof for the Commission in this case. RFRA expressly provides that the government must "demonstrate[] that application of the burden to the person - [¶] . . . [¶] . . . is

the least restrictive means of furthering th[e] compelling governmental interest." (42 U.S.C. § 2000bb-1(b).) "Demonstrate" is in turn defined in the legislation as "meet[ing] the burdens of going forward with the evidence and of persuasion." (*Id.* at section 2000bb-2(3).) In contrast, the threshold "substantial burden" inquiry to be made below, in the words of the statute, is simply this - is petitioner "[a] *person* whose religious exercise has been burdened." (42 U.S.C. § 2000bb-1(c), italics added.) In short, the focus at the "substantial burden" stage of our inquiry must be on whether the FEHA provision in question substantially burdens petitioner's free exercise rights - not on whether Phillips and Randall would be afforded less protection under FEHA's marital antidiscrimination provision, were petitioner granted an exemption from its proscripts.

For reasons not entirely clear to many, myself included, the sharply divided high court in *Smith, supra*, 494 U.S. 872, in a single judicial opinion, undid nearly three decades of traditional constitutional protection of religious liberty which the court in *Sherbert v Verner, supra*, 374 U.S. 398 set in motion in formulating the compelling interest test. In 1993, a nearly unanimous Congress, with overwhelming public support, passed federal legislation in an attempt to reestablish the traditional protections which religious liberty has long enjoyed in this country. In my view, the justices subscribing to the lead opinion have misconstrued both the letter and spirit of that important remedial legislation as it applies to this case.

It must of course be noted that there is no "majority" support in this case for the interpretation of RFRA suggested in Justice Werdegar's lead opinion. This becomes clear when one considers the basis on which Justice Mosk has provided the essential concurring fourth vote for *the result* reached by the plurality in this case. The rationale of Justice Mosk's separate

concurring opinion warrants close scrutiny. Justice Mosk would find RFRA unconstitutional; in his words, "the statute itself is without effect as violative of the United States Constitution." (Conc. opn. of Mosk, *ante*, at p. 1.) Justice Mosk then rejects petitioner's claims under the free exercise clause of the First Amendment, as that clause is interpreted by the high court's decision in *Smith, supra*, 494 U.S. 872. Indeed, Justice Mosk would go farther than did the high court in *Smith, supra*, 494 U.S. 872. He states, "one commentator has argued that the 'strongest reading of . . . *Smith* is that it may verge on unconstitutional for a court to inquire into the substantiality of an alleged burden on religious exercise.' (Idleman, *The Religious Freedom Restoration Act: Pushing the Limits of Legislative Power* (1994) 73 Tex.L.Rev. 247, 273.) [¶] In light of the foregoing, I am compelled to conclude that the best reading of *Smith* is stronger still: For a court to so inquire is in fact unconstitutional." (Conc. opn. of Mosk, *ante*, at p. 17, fn. omitted.)

In short, there is no majority support for the construction of the provisions of RFRA, or the suggested limited scope of its protection of religious liberties in California, set forth in the lead opinion. "And it is important. The lead opinion's reasoning does not express the views of a majority of this court. As a result, its analysis 'lacks authority as precedent' (*Board of Supervisors v. Local Agency Formation Com.* (1992) 3 Cal.4th 903, 918) and hence cannot bind. Therefore, its mischief is limited to this case and to this case alone." (*Alfredo A. v. Superior Court* (1994) 6 Cal.4th 1212, 1257 (dis. opn. of Mosk, J.).)

IV

Given my disagreement with the interpretation of RFRA found in the lead opinion, and my conclusion that a full

and proper application of RFRA's balancing test to the facts at hand might result in a conclusion that petitioner is entitled to an exemption under its provisions, I will proceed to discuss what I believe would be the appropriate application of RFRA's balancing test to this case.

RFRA provides that "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b)." (42 U.S.C. § 2000bb-1(a).) Under subdivision (b), "[g]overnment may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person - [¶] (1) is in furtherance of a compelling governmental interest; and [¶] (2) is the least restrictive means of furthering that compelling governmental interest." (42 U.S.C. § 2000bb-1(b).)

At the outset, I note that no party to these proceedings has directly challenged the constitutionality of RFRA as a general matter. In enacting RFRA, Congress relied on its power under section 5 of the Fourteenth Amendment, which provides that, "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." (See Sen. Rep. No. 103-111, 1st Sess., pp. 13-14 (1993), reprinted in 1993 U.S. Code Cong. & Admin. News 1892, 1903.) In *Cantwell v. Connecticut* (1940) 310 U.S. 296, the Supreme Court incorporated the Free Exercise Clause into the Fourteenth Amendment, thereby making it subject to the legislative protection afforded under Section Five of the Fourteenth Amendment. To date, at least one federal circuit court, the Court of Appeals for the Fifth Circuit, has expressly upheld the constitutionality of RFRA. (*Flores v. City of Boerne* (5th Cir. 1996) 73 F.3d 1352.) Two federal district courts have likewise reached the same conclusion. (*Sasnett v. Department of Corrections* (W.D.Wis. 1995) 891 F.Supp. 1305, 1315-1320;

Belgard v. State of Hawaii (D.Hawaii 1995) 883 F.Supp. 510, 512-517.)[11]

I also find it significant that the express language of RFRA embodies individuals with standing to seek its protections. The statute provides that "[a] person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government." (42 U.S.C. § 2000bb-1(c), italics added.) As noted, a prior version had defined "person" more broadly, but was deleted from the final version of the law. (*Ante*, at pp. 15-16.) I would not read beyond the express language of the statute. Unless construed otherwise by the high court, I view the provisions of RFRA as authorizing *persons* to seek individualized exemptions from generally applicable governmental laws or rules that burden their free exercise of religion, by authorizing them to invoke the statutorily mandated application of the

---

[11] Congress's power in this regard has been successfully exerted in other contexts. (See, e.g., the Privacy Protection Act of 1980, 42 U.S.C. sections 2000aa-2000aa-12 [restricting the ability of government investigators to obtain documents from the media, thereby limiting the effect of the high court's holding in *Zurcher v. Stanford Daily* (1978) 436 U.S. 547; the Church Audit Procedure Act of 1984, 26 U.S.C. § 7611 [strictly regulating the ability of the Internal Revenue Service to conduct "church tax examination" and "church tax inquiry"].)

Most pertinent here is Congress's enactment of the Exemption Act of 1988, 26 United States Code § 3127, which created a special Social Security tax exemption for employers and employees who are members of "a recognized religious sect" and whose "established tenets" include opposition to participation in the Social Security program. This legislation freed the Old Order Amish from the high court's holding in *United States v. Lee*, *supra*, 455 U.S. 252, which decision rejected the Amish petitioners' free exercise claim on the ground that uniform, compulsory collection of Social Security taxes was essential to accomplishing an overriding governmental interest.

compelling interest balancing test. When read together with the minimum standing requirements of article III of the Constitution which also apply to RFRA (see *Lujan v. Defenders of Wildlife* (1992) 504 U.S. 555, 560), there need be no concern that broad segments of California's citizenry will be able to seek religious-belief based exemptions from otherwise valid state laws of general applicability.

Returning to the facts of the case before us, there is no dispute that Government Code section 12955, subdivision (a), embodying FEHA's housing discrimination prohibition based on marital status, is a "neutral, generally applicable law." The antidiscrimination provision applies to landlords of all faiths, and does not single out Christians like petitioner.

Nor does anyone appear to dispute that petitioner's religious beliefs regarding the renting of her units to unmarried cohabiting heterosexual couples are sincerely held. In this regard, I find the following observations in the opinion of the Court of Appeal below, authored by Presiding Justice Robert K. Puglia and concurred in by Justice Arthur G. Scotland, with a separate concurring and dissenting opinion by Justice Vance W. Raye, pertinent here:[12]

The Commission entertained "no doubt" as to "the depth and sincerity of [plaintiff's] religious convictions . . . ."

---

[12] Brackets together, in this manner [], are used to indicate deletions from the opinion of the Court of Appeal; brackets enclosing material (other than the reporter's parallel citations) are, unless otherwise indicated, used to denote insertions or additions. Footnotes in the Court of Appeal opinion that have been retained are sequentially numbered. (See *Arriaga v. County of Alameda* (1995) 9 Cal.4th 1055, 1059; *People v. May* (1988) 44 Cal.3d 309, 315; *Estate of McDill* (1975) 14 Cal.3d 831, 834.)

[] We accept as established by the Commission's finding to that effect that [petitioner] is sincere in her expressed religious conviction and belief that [sex outside of marriage] is a sin in the commission of which she will be complicit if forced to rent to an unmarried couple. "It is not within 'the judicial function and judicial competence' . . . to determine whether [plaintiff] or the Government has the proper interpretation of [her] faith; '[c]ourts are not the arbiters of scriptural interpretation.'" (*United States v. Lee*, *supra*, 455 U.S. at p. 257.) "The determination of what is a 'religious' belief or practice is more often than not a difficult and delicate task . . . . However, the resolution of that question is not to turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit [free exercise] protection." (*Thomas v. Review Bd., Ind. Empl. Sec. Div.* (1981) 450 U.S. 707, 714 (*Thomas*).)

More importantly, the constitutional protection accorded free exercise of religion is not limited to beliefs which are shared by all members of a religious sect. (*Thomas, supra*, 450 U.S. at pp. 715-716.) "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." (*Board of Education v. Barnette* (1942) 319 U.S. 624, 642.) We thus accept on faith, as it were, the sincerity of [petitioner's] assertion her religious convictions and beliefs preclude her from renting to an unmarried couple on penalty of herself committing a sin.[13] [End

---

[13] We do not mean to suggest that every claim of religious belief warrants free exercise protection. One can easily imagine "an asserted claim so bizarre, so clearly nonreligious in motivation, as not to be entitled to [free exercise] protection . . . ." (*Thomas, supra*, 450 U.S. at p. 715.) That

of quoted portion of Court of Appeal opinion.]

As I have explained, I disagree with the rationale that leads the subscribers to the lead opinion to conclude FEHA's prohibition against housing discrimination based on marital status does not "substantially burden" petitioner's religious beliefs or free exercise rights. Here again, I commend the observations of the Court of Appeal below on that aspect of the inquiry:

"Compelling [petitioner] to rent her properties to unmarried couples, to pay damages to the unmarried complainants for refusing out of conscience to rent to them, to post notices informing prospective tenants of their rights and remedies under FEHA and specifically as it pertains to unmarried couples, and to post announcements, signed by her, that she has been adjudicated in violation of FEHA for refusing to rent to an unmarried couple interferes with and substantially burdens [her] free exercise rights. [Petitioner] cannot remain faithful to her religious convictions and beliefs and yet rent to unmarried couples. If faced with that choice, [petitioner] testified her rental units will 'stay vacant.' The Commission's order penalizes [petitioner] for her religious belief that [sex outside of marriage] and its knowing facilitation are sinful."

The Court of Appeal concluded: "[Petitioner] has been forced to choose between fidelity to her religious beliefs and renting to complainants. Choosing to follow her conscience, [she] has further suffered abridgement of her free speech rights. The coercive impact is real and the conflict is irreconcilable. While the compulsion may be indirect, the infringement upon

---

is manifestly not the case here.

fundamental rights is nonetheless substantial."

I agree with these conclusions. Petitioner presumably did not choose her religious beliefs for their convenience, yet she must, and has stated she will, abide by them despite the economic hardship of forgoing the business of unmarried couples who would otherwise make acceptable tenants. It would appear on these facts that the plurality's result in this case will place on petitioner, a widow who derives her primary source of income from the rental units in question, the very substantial burden of finding a new livelihood and means of support.

I would add that I recognize that "[t]o maintain an organized society that guarantees religious freedom to a great variety of faiths requires that some religious practices yield to the common good." (*United States v. Lee*, *supra*, 455 U.S. at p. 259; see, e.g., *Braunfeld v. Brown*, *supra*, 366 U.S. at p. 603 [state's interest in "improving the health, safety, morals and general well-being of . . . citizens" permitted enforcement of Sunday closing laws against shopkeepers who observed a Saturday Sabbath]; *Prince v. Massachusetts* (1944) 321 U.S. 158, 165 [the "interests of society to protect the welfare of children" permitted the state to apply its child labor law to bar a Jehovah's Witness from distributing religious literature on the streets].)

Nevertheless, to my mind, telling petitioner in this case she must choose between her sincerely held religious beliefs and her present means of income, support, and livelihood, that is to say, telling her to forgo her religious beliefs and "redeploy her capital" or get out of the apartment rental business, without making further inquiry into the "compelling interest," if any, the FEHA provision in question is intended to protect, the manner in which the statutory scheme seeks to attain that

compelling interest, and without further balancing the results of those inquiries against petitioner's fundamental free exercise rights, violates both the letter and spirit of her federal statutory rights under RFRA. The lead opinion's rationale is precisely the type of abbreviated analysis embraced in *Smith, supra*, 495 U.S. 874, which the federal legislation was enacted to redress.

I will therefore proceed, under the balancing test mandated by RFRA, to inquire generally into the matter of whether the state can demonstrate "that application of the burden to the person . . . is in furtherance of a compelling governmental interest; and . . . is the least restrictive means of furthering that compelling interest." (42 U.S.C. § 2000bb-1(b).) Here again, I commend that portion of the opinion of the Court of Appeal below which concluded California has no compelling interest in promoting the housing rights of unmarried couples such as would automatically outweigh petitioner's fundamental free exercise rights. The Court of Appeal reasoned as follows:[14]

California has a significant interest in eradicating discrimination in employment and housing. In 1975, provisions prohibiting sex and marital status discrimination in housing were added to the statute which previously forbade discrimination on the basis of race, creed or color. (Stats. 1975, ch. 1189, pp. 2942-2948; see also 2 Stats. 1975 (Reg. Sess.) Summary Dig., p. 322.) [As noted, *ante*, at page 11,] [a]ppellate decisions hold that "marital status" includes unmarried couples. (*Hess v. Fair Employment & Housing Com.* [*supra*,] 138 Cal.App.3d 232, 235; *Atkisson v. Kern County Housing Authority* [*supra*,] 59 Cal.App.3d 89, 99.)

---

[14] For comments as to format, see *ante*, page 30, foonote 12.

The inquiry narrows to whether California's interest in eradicating discrimination in housing against unmarried couples reaches the level of an overriding governmental interest. (See *United States v. Lee, supra*, 455 U.S. at p. 259.) It is self-evident the Legislature cannot by statute establish that a governmental interest is so compelling as to override conflicting constitutional rights. When legislative abridgment of constitutional rights is asserted, the courts must be astute to examine the effect of the challenged legislation. (*Schneider v. Irvington* (1939) 308 U.S. 147, 161.) "Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions." (*Ibid.*) "In the end, the judiciary must complete the task of determining whether a particular governmental policy is sufficiently compelling to override a claimed constitutional right." (*Gay Rights Coalition v. Georgetown Univ.* (D.C.App. 1987) 536 A.2d 1, 73 (conc. and dis. opn. of Belson, J.); see *Cleburne v. Cleburne Living Center, Inc.* (1985) 473 U.S. 432, 440-441.)

While the Legislature has proscribed discrimination on a number of grounds - race, color, religion, sex, marital status, national origin, ancestry, familial and disability status - neither the statutory language nor legislative history indicates the Legislature intended the several proscribed grounds of discrimination be arrayed in any particular hierarchy of priorities, or that within each classification legitimate distinctions might be made. It is reasonable, however, to postulate that the Legislature did not intend all such classifications to be equal. (See *Gay Rights Coalition v. Georgetown Univ., supra*, 536 A.2d at p. 72 (conc. and dis. opn. of Belson, J.).) Several factors point to this conclusion.

First, it cannot be said the goal of eliminating discrimination on the basis of unmarried status enjoys equal priority with the state public policy of eliminating racial discrimination. Racial classifications leading to different treatment always demand strict scrutiny. (*Cleburne v. Cleburne Living Center, Inc., supra*, 473 U.S. at p. 440.) No similar level of scrutiny is demanded where discrimination is on the basis of marital status and certainly not for discrimination against unmarried couples (see *Hinman v. Department of Personnel Admin.* (1985) 167 Cal.App.3d 516, 526; *Garcia v. Douglas Aircraft Co.* (1982) 133 Cal.App.3d 890, 894).

Second, the Legislature has not extended to unmarried couples numerous rights which married couples enjoy. Citing typically the lack of legislative approval, the courts have consistently refused to treat unmarried couples as the legal equivalent of married couples. (E.g., *Elden v. Sheldon* (1988) 46 Cal.3d 267, 274-279 [unmarried person does not have cause of action either for negligent infliction of emotional distress or for loss of consortium]; (*In re Cummings* (1982) 30 Cal.3d 870 [prison regulations may properly allow conjugal visitation rights to married couples but deny them to unmarried couples]; *Marvin v. Marvin* (1976) 18 Cal.3d 660 [unmarried couples do not have a right to spousal support absent a written agreement]; *Beaty v. Truck Insurance Exchange* (1992) 6 Cal.App.4th 1455, 1461 [insurer's refusal to issue joint umbrella policy, reserved for married couples, to unmarried couple is not unlawfully discriminatory]; *Hinman v. Department of Personnel Admin., supra*, 167 Cal.App.3d at p. 530 [unmarried cohabitant is not entitled to dental benefits available to family members of state employees]; *Garcia v. Douglas Aircraft Co., supra*, 133 Cal.App.3d at p. 894 [unmarried person does not have a right to bring wrongful death action on behalf of cohabiting partner]; *Harrod v. Pacific Southwest Airlines* (1981) 118 Cal.App.3d 155 [same]; *People v. Delph* (1979) 94 Cal.App.3d 411

[unmarried couples do not have marital communication privilege under the rules of evidence].) If the need to eradicate discrimination against unmarried couples is so compelling as complainants and the Commission contend, the Legislature would have responded to these judicial decisions to extend equal rights to all cohabiting Californians. (See *Garcia v. Douglas Aircraft Co.*, *supra*, 133 Cal.App.3d at p. 894.)

We deem the Legislature's lack of response to reflect the state's strong interest in the marriage relationship. "[T]he state's interest in promoting the marriage relationship is not based on anachronistic notions of morality. The policy favoring marriage is 'rooted in the necessity of providing an institutional basis for defining the fundamental relational rights and responsibilities of persons in organized society.' [Citation.]" (*Elden v. Sheldon*, *supra*, 46 Cal.3d at p. 275.)

Moreover, the legislative history suggests the Legislature's purpose in adding "marital status" to the list of proscribed bases for discrimination primarily was to protect single men and women, students, widows and widowers, divorced persons, and unmarried persons with children. Even assuming as we do (see *Hess v. Fair Employment & Housing Com.*, *supra*, 138 Cal.App.3d at p. 235; *Atkisson v. Kern County Housing Authority*, *supra*, 59 Cal.App.3d at p. 99) that "marital status" in its broadest, generic sense includes unmarried couples, a hierarchy still emerges from within the classification because the state's interest in prohibiting discrimination in housing against, for example, a widower or an unmarried woman with children is more compelling than is its interest in prohibiting discrimination against unmarried couples. To conclude otherwise would defeat the state's strong interest in promoting marriage. (*Elden v. Sheldon*, *supra*, 46 Cal.3d at p. 274; see *Norman v. Unemployment Ins. Appeals Bd.* (1983) 34 Cal.3d 1, 9 ["We reaffirm our recognition of a

strong public policy favoring marriage. [Citation.] No similar public policy favors the maintenance of nonmarital relationships."].) In short, we find no evidence the Legislature considers the extension to unmarried couples of all rights enjoyed by married couples a compelling state interest. [End of quoted portion of Court of Appeal opinion.]

It is also noteworthy that simultaneously with the additions of "sex" and "marital status" as proscribed grounds of housing discrimination, the Legislature added provisions which *authorize* public and private postsecondary educational institutions to provide accommodations limited on the basis of sex or marital status but not on the basis of race, religion, or national origin. (Stats. 1975, ch. 1189, pp. 2942-2948; see also 2 Stats. 1975 (Reg. Sess.) Summary Dig., p. 322.) Government Code section 12995 provides in relevant part: "Nothing contained in this part relating to discrimination in housing shall be construed to: [¶] . . . [¶] (2) Prohibit any postsecondary educational institution, whether private or public, from providing housing accommodations reserved for either male or female students so long as no individual person is denied equal access to housing accommodations, or from providing separate housing accommodations reserved primarily for married students or for students with minor dependents who reside with them. [¶] (3) Prohibit selection based upon factors other than race, color, religion, sex, marital status, national origin, [or] ancestry . . . ."

In short, the Legislature has reiterated that discrimination on the basis of race or creed is intolerable, but has recognized that in certain instances discrimination on the basis, for example, of marital status, is permissible given what it perceives to be the greater public benefit. Surely, petitioner's fundamental federally guaranteed free exercise rights are entitled to no less deference and respect.

Indeed, as the Court of Appeal below aptly observed, "The exemption of Government Code section 12995 for postsecondary educational institutions, if applied to these complainants, would render an anomalous result. Complainant Randall was at the time of this action a student at California State University at Chico. University officials could legally have denied complainants accommodations to live together in married student housing because of their unmarried status. Yet, [petitioner's] refusal to rent to complainants because of her religious beliefs has brought down on her the wrath of the state for doing the very thing the state, as landlord, could do with impunity. Thus, the state is, hypocritically, coercing [petitioner] to 'do as it says, not as it does.'"

As one commentator has observed: "[A] State's failure to eliminate other serious forms of discrimination suggests that the State itself currently views the interest in eliminating marital-status discrimination as somewhat less than compelling." (Comment (1995) 108 Harv.L.Rev. 763, 767.)

Assuming arguendo the state can demonstrate a sufficient "compelling governmental interest" under RFRA, a complete balancing analysis under the mandate of that federal statutory scheme requires further inquiry into whether the state can demonstrate that the challenged rule or statute "is the least restrictive means of furthering that compelling interest." (42 U.S.C. § 2000bb-1(b).)

I believe it would be administratively feasible to grant petitioner an individualized exemption from FEHA's prohibition against housing discrimination based on marital status, on a proper showing that all the elements of RFRA's balancing test were satisfied. FEHA's statutory scheme plainly includes an administrative mechanism for enforcement that would be capable of assessing, on an individualized,

case-by-case basis, the validity of a claimed entitlement to a RFRA-based exemption. The statutory scheme affords a landlord the right to an administrative hearing, and an individualized determination of whether he or she has discriminated in violation of the law. (Gov. Code, §§ 12980-12981.) A landlord who contends that religious beliefs prohibit him or her from renting to unmarried cohabiting couples should be permitted to raise a RFRA-based defense at such a hearing. The hearing officer can take evidence on the questions of the sincerity of the landlord's religious beliefs, whether those beliefs are substantially burdened by the challenged provision of the state's fair housing laws, whether the state can meet its burden of demonstrating a compelling interest in eliminating the discrimination to which the challenged provision is directed, and lastly, whether application of the challenged provision to the landlord is the least restrictive means of furthering that compelling governmental interest. Moreover, the Commission can intervene to hear the case itself, as was done here (see Gov. Code, § 11517, subd.(c)), and judicial review of any determination by way of a petition for mandamus relief is available to the parties (Code Civ. Proc., § 1094.5.)

On the question of whether the state, at such a hearing, could likely meet its burden under RFRA of demonstrating that the provision of FEHA here under scrutiny is the "least restrictive means" of furthering the antidiscrimination policy to which it is addressed, I share the viewpoint expressed by Justice Kennard, who, in her concurring and dissenting opinion, explains: "[I]n this case the religious beliefs of landlord *Smith* and others similarly situated are at odds with their economic self-interest, further reducing the probability that a religious exemption would seriously affect the housing market for unmarried heterosexual couples. In the case of religious objections to a tax or a claim for a religious exemption that

expands a religious believer's entitlement to government benefits, religious belief aligns with economic self-interest. This confluence of religious and economic motives may in some cases encourage phony claims of religious conflict. Here, by contrast, *Smith*'s sincerely held religious beliefs are contrary to her economic self-interest, for by excluding unmarried heterosexual couples she is artificially reducing demand, and thus the price she can command, for her rental housing. This further reduces the likelihood that there will be a mass movement of landlords seeking to refuse rentals on religious grounds to unmarried heterosexual couples." (Conc. & dis. opn. of Kennard, J., *ante*, at p. 32.)

In that same vein are the following observations of the Court of Appeal below, with which I also agree: "The instant case does not raise the spectre of floodgates opened to a myriad of exemptions from the state antidiscrimination law. To the contrary, we are confronted with a single landlord with two duplexes whose religious convictions will be violated if she is forced to rent her premises to unmarried couples. There is nothing in the record to indicate the number of landlords similarly circumstanced is so great as to cause a serious shortage of housing for unmarried couples. There likewise is no evidence in the record to indicate landlords all over the state will suddenly experience religious conversions in order to obtain exemption from the statutory proscription of discrimination on the basis of marital status. In fact, the economic interests of landlords as a class would counsel otherwise."

Given these realities, and the record before us, it is far from clear to me that the state could meet its burden of demonstrating that the blanket application of Government Code section 12955, subdivisions (a) and (d) to petitioner constitutes the least restrictive means of enforcing the state's policy of

prohibiting housing discrimination against unmarried cohabiting heterosexual couples. In any event, the specific requirements of RFRA were never directly addressed below (see post, at pp. 48-49), and as I shall conclude, this case should therefore be remanded for further proceedings consistent with the mandate of that federal legislation.

V

Given my conclusion that RFRA applies to this case, that the federal legislation affords petitioner in the first instance statutory protection of her right to free exercise of her religion, that the balancing test mandated under RFRA was never directly invoked below, and that therefore this matter should be remanded for a full and proper application of that test to the facts of this case, I would not address petitioner's further claims under the federal or state Constitutions. Because Justice Kennard would go even farther and find, on the record before us, that RFRA prohibits the Commission from applying FEHA to petitioner, she likewise stands on firm ground in concluding that she need not address petitioner's claims under the state Constitution. (Conc. & dis. opn. of Kennard, J., *ante*, at pp. 33-34.) The lead opinion and concurring opinion of Justice Mosk are not on such firm footing.

It is suggested in the lead opinion that the question of whether the California Constitution's free exercise clause (art. I, § 4) is *more protective* than the federal Constitution's free exercise clause (U.S. Const., 1st Amend.) is, to date, not definitively settled. (Lead opn., *ante*, at p. 42.) That may be so. We are all seemingly in agreement, however, that the protection afforded petitioner's right of religious liberty under our state Constitution is *at least* as extensive as that afforded her under the federal Constitution. The lead opinion so concludes, wherein it is observed that "California courts have

typically construed the provision [art. I, § 4] to afford the same protection for religious exercise as the federal Constitution before *Employment Division v. Smith, supra*, 494 U.S. 872. Indeed, our more recent cases treat the state and federal free exercise clauses as interchangeable and apply, to both, the compelling state interest test articulated in *Sherbert v Verner, supra*, 374 U.S. 398, and *Wisconsin v. Yoder, supra*, 406 U.S. 205. (See *Walker v. Superior Court* (1988) 47 Cal.3d 112, 138-141 [evaluating under *Yoder* the claim of a criminal defendant that his failure to obtain medical treatment for a child was religiously motivated]; *Molko v. Holy Spirit Assn.* (1988) 46 Cal.3d 1092, 1112-1120 [rejecting, under *Yoder*, the defense of religious motivation to a cause of action for fraud]; *In re Arias* (1986) 42 Cal.3d 667, 692 [applying *Sherbert* to prohibit electronic monitoring devices in the chapel of a Youth Authority facility]; *People v. Woody* (1964) 61 Cal.2d 716, 718, fn. 1 [reversing, under *Sherbert*, a conviction for using peyote as a sacrament of the Native American Church].)" (Lead opn., *ante*, at pp. 39-40.)

The lead opinion concludes that "[u]nder the approach of these cases, the analysis that disposes of Smith's claim under RFRA also disposes of her claim under article I, § 4, of the state Constitution." (Lead opn., *ante*, at p. 40.) I respectfully disagree. The four decisions of this court noted in the quoted portion of the lead opinion, and relied on by the plurality herein, were decided *prior* to the high court's decision in *Smith, supra*, 494 U.S. 872. All were decided *before* the enactment of RFRA, which legislation was passed in response to the holding in *Smith*. I am aware of no case decided by this court since *Smith* was handed down in which we have *limited* the scope of protection of religious liberty afforded under article I, § 4 of our state Constitution in the manner in which the high court in *Smith* limited the constitutional interpretation of the protection of religious liberty under the First Amendment to the United

States Constitution.

Nor, until today, has this court ever suggested that the scope of protection of religious liberty under the free exercise clause of the First Amendment as construed in *Smith, supra*, 494 U.S. 872, or under RFRA, or under any case that has sought to interpret the scope of that federal legislation, has any bearing on the protection of religious liberty as independently guaranteed under article I, § 4 of our state Constitution. It is simply incorrect for the subscribers to the lead opinion's interpretation of RFRA to suggest that the disposition of petitioner's claim, purportedly thereunder, somehow "disposes of her claim under article I, § 4, of the state Constitution." (Lead opn., *ante*, at p. 40.) And it would likewise be incorrect to conclude that the plurality's "majority" holding today, reached under the rationale of *Smith, supra*, 494 U.S. 872, stands as a definitive interpretation of the scope of religious protection afforded under the free exercise clause of article I, § 4 of our state Constitution.

Justice Kennard and I, having concluded that the federal statute (RFRA) affords *protection* of petitioner's fundamental right to the free exercise of her religion, have no compelling need or occasion to address petitioner's further state constitutional challenge to the provision of FEHA here in question. Fundamentally, under the supremacy clause of the federal Constitution (U.S. Const., art. VI, § 2), the provisions of RFRA must prevail over state law to the contrary.

The plurality, in contrast, having found no protection of petitioner's fundamental free exercise rights under federal statutory or constitutional law, is obligated to further address petitioner's claims under the state Constitution in a meaningful manner. The plurality has not done so.

The lead opinion states: "[Petitioner's] claim to an exemption implicates three areas of law: the First Amendment to the United States Constitution, the Religious Freedom Restoration Act of 1993 (42 U.S.C. § 2000bb et seq.), and article I, § 4, of the California Constitution. We consider each in turn." (Lead opn., *ante*, at pp. 16-17.) The lead opinion goes on to hold: "The First Amendment does not support [petitioner's] claim. Her religion may not permit her to rent to unmarried cohabitants, but 'the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).' (*Employment Division v. Smith* (1990) 494 U.S. 872, 879, quoting *United States v. Lee* (1982) 455 U.S. 252, 263, fn. 3.) The statutory prohibition against discrimination because of marital status (§ 12955) is a law both generally applicable and neutral towards religion. The law is generally applicable in that it prohibits all discrimination without reference to motivation. The law is neutral in that its object is to prohibit discrimination irrespective of reason - not because it is undertaken for religious reasons. (See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah* (1993) 508 U.S. 520, ___.) Consequently, section 12955 does not violate the free exercise clause as interpreted in *Employment Division v. Smith, supra*. [¶] The foregoing principles reflect the latest evolution in the United States Supreme Court's understanding of the free exercise clause. . . . [T]hey bar [petitioner's] claim under the federal Constitution to an exemption from FEHA . . . ." (Lead opn., *ante*, at p. 17.)

The lead opinion, together with Justice Mosk's separate concurring opinion, therefore form a majority *only* for the proposition that petitioner's free exercise claims must fail under the First Amendment to the federal Constitution as interpreted by *Smith, supra*, 494 U.S. 872. That being the only true

majority holding in this case, the failure of the plurality to reckon with petitioner's state constitutional claims takes on added significance. One might ask - in light of the majority holding of this case - can the plurality reasonably avoid further scrutiny of petitioner's claims under the state Constitution's free exercise clause of article I, § 4? Are the lead and concurring opinions suggesting, without independent analysis, that the protection of religious liberty afforded under the free exercise clause of the California Constitution is henceforth to be limited in the same manner that the First Amendment's protection of religious liberty was limited by the high court in *Smith*? For some further guidance, we might turn to the plurality of opinions filed in one of this court's most recent religious liberties cases - *Sands v. Morongo Unified School Dist.* (1991) 53 Cal.3d 863 (*Sands*).

In *Sands, supra*, 53 Cal.3d 863, a plurality of this court held that a school district's practice of conducting prayers at public school graduation ceremonies violated the establishment clauses of both the federal (U.S. Const., 1st Amend.) and state (art. I, § 4) Constitutions. (53 Cal.3d at p. 867.) I dissented. Because I concluded that the First Amendment does not bar all religious content in public high school graduation ceremonies, I recognized that the restrictions of the California Constitution to the issue there at hand would also have to be addressed by this court. (*Sands, supra*, 53 Cal.3d 863, 945 (dis. opn. of Baxter, J.).)

The plurality in *Sands, supra*, 53 Cal.3d 863, could have reached its conclusion under the federal Constitution alone, for once it determined the school district's practice of conducting prayers at public school graduation ceremonies violated the establishment clause of the federal Constitution (contrary to my own views in that case), nothing in the California Constitution, or any other source of California law,

could have validated the school prayer practices. (U.S. Const., art. VI, § 2.) Still, the plurality in *Sands* proceeded to invoke article I, § 4 of the California Constitution as an independent ground for striking down such school prayers. (*Sands, supra*, 53 Cal.3d at p. 867.)

In a separate concurring opinion in *Sands, supra*, 53 Cal.3d 863, Chief Justice Lucas - who joined in the plurality's holding that the school prayer practices there in question violated the establishment clause of the First Amendment under the "*Lemon* test" (*Lemon v. Kurtzman* (1971) 403 U.S. 602) - further concluded, in light of that finding of a violation under the federal Constitution, that the Sands plurality need not have, and should not have, reached petitioners' further claims that the prayer practices also violated article I, § 4 of the California Constitution. (*Sands, supra*, 53 Cal.3d 863, 902-905 (conc. opn. of Lucas, C.J.).)

In his separate concurring opinion in *Sands, supra*, 53 Cal.3d 863, Justice Mosk, in full agreement with the majority's determination to ground its holding, in part, on the provisions of the state Constitution, offered some observations about when this court should look to the California Constitution's independent guarantee of religious rights in the face of a party's claim that his rights thereunder are being abridged by some governmentally sanctioned law, rule, or practice. In my view, Justice Mosk's observations in Sands take on particular importance and relevance in the context of the legal issue presented in this case.

In *Sands, supra*, 53 Cal.3d 863, Justice Mosk first registered his belief that "religious invocations and benedictions at public high school graduation ceremonies violate both the federal and California Constitutions." (*Id.* at p. 905 (conc. opn. of Mosk, J.).) He then turned his attention to

that aspect of Chief Justice Lucas's concurring opinion in *Sands*, paraphrased above, which suggested that where a governmental law, rule or practice is found unconstitutional under the United States Constitution, this court is not compelled to reach a petitioner's related claims under the state Constitution. Justice Mosk offered the following observations in response to Chief Justice Lucas's separate concurrence:

"[A]s the highest court of this state, we are independently responsible for safeguarding the rights of our citizens. State courts are, and should be, the first line of defense for individual liberties in the federal system. It is unnecessary to rest our decision on federal authority when the California Constitution alone provides an independent and adequate state constitutional basis on which to decide. (See, e.g., *People v. Brisendine* (1975) 13 Cal.3d 528, 551.)

"In his separate concurrence the Chief Justice virtually begs the Supreme Court to relieve us of our duty under the Constitution of California. Such a supplication is unprecedented. We are not a branch of the federal judiciary; we are a court created by the Constitution of California and we owe our primary obligation to that fundamental document. Only if an issue cannot be determined with finality under state constitutional doctrine do we turn to federal authority for assistance.

"The Chief Justice suggests that after federal review we may possibly consider state constitutional issues. This is not only the horse trailing the cart, it results in unnecessary delay, additional costs to the parties - one here being a tiny school district - and a duplicative burden on judicial resources. *State law and state constitutional principles should be our first, not our last, referent.*

"The Minnesota Supreme Court experience should be a lesson to us. In *State v. Hershberger* (Minn. 1989) 444 N.W.2d 282, the court held the Amish are entitled to religious exemption from certain traffic requirements. The United States Supreme Court granted certiorari, took the case over, and then remanded for consideration in the light of its opinion in *Employment Div. Dept. of Human Resources of Oregon v. Smith* (1990) 494 U.S. 872 [holding no religious exemption for peyote users].

"On remand, the Minnesota court declined to follow *Smith*, and instead, relying on the state Constitution, reiterated its original conclusion (*State v. Hershberger* (Minn. 1990) 462 N.W.2d 393). While the ultimate result in Minnesota was a vindication of state constitutionalism, the delay in achieving finality, the time and expense of unnecessary proceedings, and the duplicative burden on judicial resources, should caution us against traveling the same route in the instant case." (*Sands, supra*, 53 Cal.3d at pp. 905-906 (conc. opn. of Mosk, J.), italics in original.)

Returning to the case before us, unlike the issue and holding in *Sands, supra*, 53 Cal.3d 863, here the lead and concurring opinions have not found a governmental law, rule or practice violative of the federal Constitution. FEHA's prohibition against housing discrimination based on marital status was not being challenged as unconstitutional in the proceedings below. Instead, we have an individual, petitioner Evelyn Smith, who, based on the particular facts and circumstances of this case, is seeking an individualized exemption from FEHA's requirement that she go against her sincerely held fundamental religious beliefs and offer her rental units for lease to unmarried cohabiting heterosexual couples. These are religious beliefs which, I might add, undeniably enjoy *some* level of protection under our state Constitution,

particularly so where a plurality of this court is finding that they enjoy virtually no such protection under the "latest evolution in the United State's Supreme Court's understanding of the [First Amendment's] free exercise clause." (Lead opn., *ante*, at p. 17.)

The views of Justice Mosk, as set forth in his separate concurring opinion in *Sands, supra*, 53 Cal.3d 863, would therefore appear to me to have more pertinent application to this case. Without further critical analysis, I would not read the lead opinion and concurring opinion of Justice Mosk as together definitively setting forth the scope of protection of religious liberty under the free exercise clause of our state Constitution.

CONCLUSION

The hearing before the administrative law judge in this case, and the subsequent proceedings had before the Commission, were conducted in 1988 and 1989, well before RFRA's enactment and, indeed, prior to the high court's decision in *Smith, supra*, 495 U.S. 874, which prompted Congress to enact the remedial legislation. RFRA, by its own terms, is broadly and expressly retroactive, "appl[ying] to all Federal and State law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after [November 16, 1993 (the date on which RFRA became effective)]." (42 U.S.C. § 2000bb-3(a).) RFRA mandates retroactive application of the compelling interest test to petitioner's free exercise claim. Application of that test in turn requires that findings of fact be made, and various factors balanced, toward determining whether the state can meet its burden of demonstrating that the housing discrimination provision in question is the "least restrictive means" of implementing a "compelling governmental interest" in

furtherance of the statute's purpose, or whether petitioner is instead entitled to an individualized exemption from the provision based on the particular facts of this case. The specific procedures outlined in RFRA were not in effect at the time the Commission heard this case and found petitioner in violation of FEHA, nor did the Commission elect to adopt the findings and conclusions made by the administrative law judge respecting petitioner's constitutional claims. I therefore conclude the most appropriate disposition would be to remand the matter for further proceedings consistent with the requirements of that federal legislation.

I would reverse the judgment of the Court of Appeal with directions to remand this matter for further proceedings consistent with the mandate of RFRA.

LUCAS, C.J., concurring.

CALIFORNIA COURT OF APPEAL DECISION

Evelyn SMITH, Petitioner,
v.
COMMISSION OF FAIR EMPLOYMENT AND HOUSING, Respondent,
and
Kenneth C. PHILLIPS et al.,
Real Parties in Interest.

No. C007654.

California Court of Appeal,
Third District.
May 26, 1994
as modified June 23, 1994

PUGLIA, P.J.

I

The California Fair Employment and Housing Act ("FEHA"; Gov.Code, §12900 et seq.) prohibits a landlord from discriminating against any individual on the basis of marital status (Gov.Code, §12955, subds. (a), (d)). Real parties in interest Kenneth Phillips and Gail Randall (complainants), an unmarried couple, filed a complaint with the Department of Fair Employment and Housing (Department) alleging petitioner Evelyn Smith (plaintiff) refused to rent housing to them because of their marital status. The Department issued an accusation charging plaintiff with unlawful discrimination. Relying on her religious convictions and beliefs and the constitutional protection of their free exercise, plaintiff sought exemption

from the law prohibiting housing discrimination on the basis of marital status.

Following an administrative hearing, respondent Fair Employment and Housing Commission (Commission) issued its decision finding plaintiff had unlawfully discriminated against complainants because of their marital status. The Commission awarded complainants damages and imposed certain affirmative obligations on plaintiff to effectuate the purpose of FEHA. (Gov.Code, § 12987; Stats.1981, ch. 899, p. 3424, § 3.) The Commission declined to rule on plaintiff's constitutional claim.

Alleging the controversy presents exclusively issues of law, plaintiff petitioned this court in the first instance for a writ of mandate to compel the Commission to set aside its decision. We issued an alternative writ to address an issue of first impression: whether the statute prohibiting discrimination in housing on the basis of marital status is unconstitutional as applied to persons such as plaintiff whose religious convictions and beliefs forbid them to rent to mixed gender couples who are not married to each other (unmarried couples). We shall hold that the Commission order applying FEHA to penalize plaintiff for marital status discrimination in housing violates plaintiff's rights as protected by both the federal and state Constitutions. (U.S. Const., Amend. I; Cal. Const., art. I, § 4.) Accordingly, we shall order a writ of mandate to issue as prayed.

II

The facts are not in dispute. Plaintiff, a widow, is a member of the Bidwell Presbyterian Church in Chico. She owns two duplexes in Chico the rents from which provide her primary source of income. Because of her religious

conviction that fornication is a sin, plaintiff refuses to rent to unmarried couples. She informs couples interested in renting that she prefers to rent to married couples, although she rents to single, divorced and widowed individuals as well.

Complainants are an unmarried couple. When complainants expressed an interest in renting one of plaintiff's duplex units, plaintiff informed them, as was her custom, that she preferred renting to married couples. Complainants falsely represented to plaintiff they were married. Plaintiff agreed to rent one of the duplex units to them and complainants gave plaintiff a deposit.

Before moving into the duplex, complainants informed plaintiff they were not married. Plaintiff canceled the agreement, refused to rent to complainants and returned complainants' deposit. Plaintiff would have rented the unit to complainants had they been married.

Plaintiff refused to rent to complainants because of her religious conviction that sex outside of marriage is sinful; plaintiff believes she would be committing a sin if she rented to people who engage in nonmarital sex. Plaintiff explained: "I believe it's a sin to have sex out of marriage, and if I rent to [complainants] I'm also contributing to their sin and it's a sin for me. I believe that I have to answer [for] that as long as I know it's a sin and if I am assisting them in committing the sin, then I'm guilty, also."

The Commission found plaintiff violated Government Code § 12955, subdivisions (a) and (d).[1] The Commission

---

[1] Government Code section 12955 states in relevant part: "It shall be unlawful: [¶] (a) For the owner of any housing accommodation to discriminate against any person because of the race, color, religion, sex,

awarded complainants out of pocket and emotional distress damages totalling $954.[2] Plaintiff was ordered to "cease and desist" marital status discrimination. Plaintiff was also ordered to post in her rental units for a period of 90 days notice announcing she had been adjudicated in violation of FEHA for refusing to rent to prospective tenants because they were an unmarried couple. She was ordered to post permanently in her rental units a notice to rental applicants of their rights and remedies under FEHA generally and specifically with regard to discrimination against unmarried couples. Plaintiff was ordered to sign both notices and to provide copies to each person thereafter who expressed interest in renting from plaintiff.[3]

---

marital status, national origin, ancestry, familial status, or disability of that person. [¶] (d) For any person subject to the provisions of Section 51 of the Civil Code, as that section applies to housing accommodations, to discriminate against any person because of sex, color, race, religion, ancestry, national origin, familial status, marital status, blindness or other physical disability, or on any other basis prohibited by that section."

[2] A component of the emotional distress damages found by the Commission was that plaintiff's refusal to rent to complainants "revived for complainant Randall the pain of her parents' disapproval of her living with complainant Phillips." Randall was awarded $300 for her emotional trauma. Phillips was awarded $200. The award of damages for emotional distress cannot stand. On appeal, the Commission concedes it is without the power to award such damages. (See *Walnut Creek Manor v. Fair Employment & Housing Com. (1991) 54 Cal.3d 245, 251, 267.)*

[3] The Commission also concluded plaintiff's conduct constituted a form of arbitrary discrimination by a business establishment in violation of Civil Code section 51 and Government Code section 12948. At the time of these events Civil Code section 51 provided: "This section shall be known, and may be cited, as the Unruh Civil Rights Act. "All persons within the jurisdiction of this state are free and equal, and no matter what

III

Religious freedom is among the highest values of our society. (See *Murdock v. Pennsylvania* (1943) 319 U.S. 105, 115-117 [87 L.Ed. 1292, 1299-1301]; *Jones v. Opelika* (1943) 319 U.S. 103, 104 [87 L.Ed. 1290, 1292]; *Martin v. Struthers* (1943) 319 U.S. 141, 149-150 [87 L.Ed 1313, 1320-1321], conc. opn. of Murphy, J.) However, even the highest values must sometimes give way to the greater public good. (See *e.g., United States v. Lee* (1982) 455 U.S. 252, 257 [71 L.Ed.2d 127, 132] ["Not all burdens on religion are unconstitutional."]; *Sherbert v. Verner* (1963) 374 U.S. 398, 403 [10 L.Ed.2d 965, 970].) The question here presented is whether plaintiff is constitutionally entitled to exemption from the operation of a statute designed to eliminate housing discrimination against unmarried couples where the enforcement of the statute would interfere with plaintiff's free exercise of religion.

The Commission entertained "no doubt" as to "the depth and sincerity of [plaintiff's] religious convictions.... The Commission believed, however, it lacked authority to decide plaintiff's constitutional claim and deferred the issue "to the consideration of the courts." We accept as established

---

their sex, race, color, religion, ancestry, or national origin are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever. "This section shall not be construed to confer any right or privilege on a person which is conditioned or limited by law or which is applicable alike to persons of every sex, color, race, religion, ancestry, or national origin." (Stats.1974, ch. 1193, p. 2568,, s 1.) Government Code section 12948 provides: "It shall be an unlawful practice under this part for a person to deny or to aid, incite, or conspire in the denial of the rights created by Section 51 or 51.7 of the Civil Code."

by the Commission's finding to that effect that plaintiff is sincere in her expressed religious conviction and belief that fornication is a sin in the commission of which she will be complicit if forced to rent to an unmarried couple. "It is not within 'the judicial function and judicial competence' ... to determine whether [plaintiff] or the Government has the proper interpretation of [her] faith; '[c]ourts are not the arbiters of scriptural interpretation.' " (*United States v. Lee, supra*, 455 U.S. at p. 257 [71 L.Ed.2d at p. 132].) "The determination of what is a 'religious' belief or practice is more often than not a difficult and delicate task.... However, the resolution of that question is not to turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit [free exercise] protection." (*Thomas v. Review Bd., Ind. Empl. Sec. Div.* (1981) 450 U.S. 707, 714 [67 L.Ed.2d 624, 631].)

More importantly, the constitutional protection accorded free exercise of religion is not limited to beliefs which are shared by all members of a religious sect. (*Thomas, supra,* at pp. 715-716 [67 L.Ed.2d at p. 632].) "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." (*West Virginia State Bd. of Edu. v. Barnette* (1942) 319 U.S. 624, 642 [87 L.Ed. 1628, 1639].) We thus accept on faith, as it were, the sincerity of plaintiff's assertion her religious convictions and beliefs preclude her from renting to an unmarried couple on penalty of herself committing a sin.[4]

---

[4] We do not mean to suggest that every claim of religious belief warrants free exercise protection. One can easily imagine "an asserted claim

Compelling plaintiff to rent her properties to unmarried couples, to pay damages to the unmarried complainants for refusing out of conscience to rent to them, to post notices informing prospective tenants of their rights and remedies under FEHA and specifically as it pertains to unmarried couples, and to post announcements, signed by her, that she has been adjudicated in violation of FEHA for refusing to rent to an unmarried couple interferes with and substantially burdens plaintiff's free exercise rights. Plaintiff cannot remain faithful to her religious convictions and beliefs and yet rent to unmarried couples. If faced with that choice, plaintiff testified her rental units will "stay vacant." The Commission's order penalizes plaintiff for her religious belief that fornication and its knowing facilitation are sinful.

IV

The conclusion that there is a conflict between plaintiff's religious convictions and beliefs and the command of the statute as imposed upon her is only the beginning of our inquiry.

The First Amendment to the United States Constitution provides in part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech...."

Article I, section 4 of the California Constitution

---

so bizarre, so clearly nonreligious in motivation, as not to be entitled to [free exercise] protection...." *(Thomas, supra,* 450 U.S. at p. 715 [67 L.Ed.2d at p. 632].) That is manifestly not the case here.

guarantees the "free exercise and enjoyment of religion."

Until 1990 when the United States Supreme Court decided *Employment Division v. Smith* (1990) 494 U.S. 872 [108 L.Ed.2d 876], it had been generally assumed that free exercise infringement claims were to be subjected to strict scrutiny: Government regulation is not unconstitutional either if it does not infringe on constitutional rights of free exercise or, where it does, if the burden on free exercise is justified by a compelling state interest in the regulation of a matter within the state's power to regulate. (See *Sherbert, supra*, 374 U.S. at pp. 402-403 [10 L.Ed.2d at pp. 969-970]; *Molko v. Holy Spirit Assn.* (1988) 46 Cal.3d 1092, 1112-1113; *People v. Woody* (1964) 61 Cal.2d 716, 718-719; See also *First Covenant Church v. Seattle* (Wash.1992) 120 Wash.2d 203, 840 P.2d 174, 183.) The party who alleges government interference with free exercise of religion has the burden of showing "the coercive effect of the enactment as it operates against him in the practice of his religion." (*Abington School District v. Schempp* (1963) 374 U.S. 203, 223 [10 L.Ed.2d 844, 858]; *People v. Woody, supra*, 61 Cal.2d at pp. 718-719.) If the party is able to establish the infringement on his right to free exercise, the court subjects the infringement to strict scrutiny. (*Hobbie v. Unemployment Appeals Commission* (1987) 480 U.S. 136, 141 [94 L.Ed.2d 190,197-198]; *Sherbert, supra*, 374 U.S. at pp. 406-407 [10 L.Ed.2d at p. 972]; *First Covenant Church v. Seattle, supra*, 840 P.2d at p. 183.) The state then must establish the infringement is justified by a compelling state interest and the enactment is the least restrictive means to achieve the state's end. (*See Sherbert, supra*, 374 U.S. at pp. 406-409 [10 L.Ed.2d at pp. 972-973]; *Molko v. Holy Spirit Assn., supra*, 46 Cal.3d at pp. 1112- 1113, 1117-1119; *People v. Woody, supra*, 61 Cal.2d at pp. 718-719; *Mullaney v. Woods* (1979) 97 Cal.App.3d 710, 724-727; *Montgomery v. Board of*

Retirement (1973) 33 Cal.App.3d 447, 451-452.)

In *Smith,* the United States Supreme Court enlarged upon the proper analytical approach to free exercise infringement claims under the First Amendment. Smith held "as a textual matter" that the First Amendment's proscription against laws "prohibiting the free exercise [of religion]" is not implicated merely by the state "requiring any individual to observe a generally applicable law that requires (or forbids) the performance of an act that his religious belief forbids (or requires)." (*Smith,* 494 U.S. 872 at p. 878 [108 L.Ed.2d 876 at p. 885].) Rather, "it is a permissible reading of the text ... to say that if prohibiting the exercise of religion ... is not the object of the [law] but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended." (At p. 878 [108 L.Ed.2d at p. 885].)

In *Smith* respondents, two drug rehabilitation counselors, had been fired from their jobs because they used peyote for sacramental purposes in a religious ceremony. Respondents' applications for unemployment compensation were denied because they had been dismissed for "work-related" misconduct and thus were ineligible under Oregon's unemployment compensation law. The Oregon Supreme Court ruled in favor of the respondents, holding they could not be denied benefits based on conduct which is protected by the free exercise clause of the federal Constitution.

The United States Supreme Court held respondents were not entitled to place their free exercise claims above the state's unemployment compensation scheme. Noting the First Amendment absolutely prohibits the regulation of beliefs "as such" and that government may not compel or punish the

expression of religious belief, the *Smith* court concluded the First Amendment prohibits laws that ban conduct only when the conduct is engaged in for religious purposes or because of the religious belief it displays. (494 U.S. at pp. 876-877 [108 L.Ed.2d at pp. 884-885].) Religious motivation does not place conduct "beyond the reach of a criminal law that is not specifically directed at [the] religious practice...." (*Id.*, at p. 878 [108 L.Ed.2d at p. 885].)

Thus the application of general criminal laws to religiously motivated conduct is no different than the application of general tax laws to persons who believe support of organized government is sinful. In either case, free exercise as protected by the First Amendment does not exempt an individual from complying with a " 'neutral law of general applicability [simply because] the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).' " (*Smith, supra*, at p. 879 [108 L.Ed.2d at p. 886], citing *United States v. Lee, supra,* 455 U.S. 252.)[5]

The *Smith* majority decision purports to be a logical extension of the established free exercise jurisprudence of the court: "The only decisions in which we have held that the

---

[5] Lower courts have not limited the holding of *Smith* to instances where free exercise is infringed by criminal sanctions. (See e.g., *Vandiver v. Hardin County. Bd. of Educ.* (6th Cir.1991) 925 F.2d 927, 932 [state may require student in religiously oriented course of home-study to pass equivalency examination]; *Salvation Army v. N. J. Dept. of Community Affairs* (3rd Cir.1990) 919 F.2d 183, 194-196 [a statute regulating rooming and boarding houses applies to facility operated by religious group]; *St. Bartholomew's Church v. City of New York* (2nd Cir.1990) 914 F.2d 348, 354 [City landmark preservation ordinance applies to church property]; *Health Services v. Temple Baptist Church* (N.M.App.1991) 814 P.2d 130, 134.)

First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press, ..." (*Smith, supra*, 494 U.S. at 881 [108 L.Ed.2d 887].)

Since the facts before it did not present such a "hybrid situation" (at 494 U.S. 882 [108 L.Ed.2d at p. 888]), the *Smith* court declined to subject respondents' claims for religious exemption from the Oregon law to the balancing test applied in cases such as *Sherbert v. Verner, supra*, 374 U.S. 398 [10 L.Ed.2d 965], *i.e.*, that "governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest." (*Smith, supra*, 494 U.S. 883, 885 [108 L.Ed.2d 888, 889].) The court observed: "The 'compelling governmental interest' requirement seems benign, because it is familiar from other fields. But using it as the standard that must be met before the government may accord different treatment on the basis of race, See, *e.g., Palmore v. Sidoti*, 466 U.S. 429, 432, 80 L.Ed.2d 421, 104 S.Ct. 1879 (1984), or before the government may regulate the content of speech, See, *e.g., Sable Communications of California v. FCC,* 492 U.S. 115, 126, 106 L.Ed.2d 93, 109 S.Ct. 2829 (1989), is not remotely comparable to using it for the purpose asserted here. What it produces in those other fields--equality of treatment and an unrestricted flow of contending speech-- are constitutional norms; what it would produce here--a private right to ignore generally applicable laws--is a constitutional anomaly." (*Smith, supra*, 494 U.S. at p. 885-886 [108 L.Ed.2d 890].)

The *Smith* court cited examples of hybrid cases involving free exercise claims that touch on other constitutional protections ranging from freedom of speech and

press to parental rights. (*Smith, supra*, 494 U.S. at p. 881 [108 L.Ed.2d at p. 887].)[6]

Among the examples noted by the court were "cases prohibiting compelled expression, decided exclusively upon free speech grounds [that] also involved freedom of religion, *cf. Wooley v. Maynard*, 430 U.S. 705, 51 L.Ed.2d 752, 97 S.Ct. 1428 (1977) (invalidating compelled display of a license plate slogan -hat offended individual religious beliefs); *West Virginia Bd. of Education v. Barnette*, 319 U.S. 624, 87 L.Ed. 1628, 63 S.Ct. 1178, 147 ALR 674 (1943) (invalidating compulsory flag salute statute challenged by religious objectors)." (*Smith, supra*, 494 U.S. at p. 882 [108 L.Ed.2d at p. 887].)

In such cases where a statute infringes on rights of free speech as well as free exercise of religion, the measure of constitutionality remains the compelling state interest test. (*Smith, supra*, 494 U.S. at pp. 881, 884- 885 [108 L.Ed.2d at p. 887, 889-890].)

This is such a case. Plaintiff's free speech rights are implicated here as well as her free exercise rights. As a penalty for violation of FEHA plaintiff was ordered to post in her rental units for 90 days a notice that she had been adjudicated guilty of discrimination in housing on the basis of marital status. The notice states in relevant part: "After a full hearing, the ... Commission has found that Evelyn Smith,

---

[6] For example, in *Wisconsin v. Yoder* (1972) 406 U.S. 205 [32 L.Ed.2d 15], the Court ruled Wisconsin's compulsory school attendance law could not withstand strict scrutiny because " 'the interests of parenthood [were] combined with a free exercise claim[.]' " (*Smith, supra*, 494 U.S. at p. 881, fn. 1 [108 L.Ed.2d at p. 887, fn. 1], quoting *Wisconsin v. Yoder*, 406 U.S. at p. 233 [32 L.Ed.2d at p. 35].)

the owner of rental property at 675-685 Eastwood Avenue, Chico, California, violated the California Fair Employment and Housing Act by refusing to rent to two applicants because they were an unmarried couple., Plaintiff was ordered to sign this notice. Additionally, plaintiff was ordered permanently to post in her rental units a notice summarizing certain provisions of FEHA which states, inter alia, that "it is illegal for [a landlord] to ... deny [prospective tenants] housing ... because of [their] marital status, ask [prospective tenants] about [their] marital status, or state to prospective tenants any preference to rent based on marital status." This notice further states "Discrimination because of marital status includes taking any of the [illegal] actions described against an unmarried couple." Plaintiff was also ordered to sign this notice.

Applying the rationale of *Smith*, it is clear that free exercise of religion as protected by the First Amendment is not actionably infringed by applying to plaintiff a facially neutral statute which merely proscribes marital status discrimination, notwithstanding plaintiff's religious scruples against renting to unmarried couples. (See *Smith, supra*, 494 U.S. at pp. 876-879 [108 L.Ed.2d at pp. 884-886].) But plaintiff does not complain only of infringement of her free exercise rights. She contends her First Amendment right to freedom of speech is abridged by forcing her to post notices on her property proclaiming concepts and rules which are antithetical to her religious beliefs and signing them as if to make them her own. We have no doubt the coerced posting of these notices implicates plaintiff's First Amendment right to freedom of speech. (U.S. Const., Amend. I.)[7]

---

[7] Totalitarian governments also attempt to enforce conformity by forcing apostates to become instruments of their own abasement. For

"[T]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all. [Citation.] ... The right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.' [Citation.]" (*Wooley v. Maynard* (1977) 430 U.S. 705, 714 [51 L.Ed.2d 752, 762].)

In *Wooley* a three judge federal District Court enjoined New Hampshire from prosecuting respondents under a criminal statute that would penalize respondents for covering that portion of their New Hampshire vehicle license plates that contains the state motto, "Live Free or Die." Respondents, Jehovah's Witnesses, sought injunctive relief to prohibit the state from coercing them "into advertising a slogan which [they found] morally, ethically, religiously and politically abhorrent." (430 U.S. at 713 [51 L.Ed.2d at 761].) The Supreme Court characterized the New Hampshire statue as a "measure which forces an individual, ... to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable." (*Wooley, supra*, 430 U.S. at 715 [51 L.Ed.2d at 762].) The statute, said the court, "in effect requires that [respondents] use their private property as a 'mobile billboard' for the State's ideological message--or suffer a penalty ... The First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster, in the way New Hampshire commands, an idea they find morally objectionable., (*Wooley, supra*, 430 U.S. at pp. 715 [51

---

example, during the so-called "Cultural Revolution" in Communist China, non-conformists who did not subscribe to the orthodoxy of the ruling elite were subjected to obloquy and humiliation by being forced to parade on public streets while wearing ludicrous dunce caps.

L.Ed.2d at 763].)

Affirming the District Court, the Supreme Court concluded New Hampshire had not shown a sufficiently compelling state interest to justify requiring respondents to display the state motto on their license plates since the purpose of the requirement, " 'even though ... legitimate and substantial, cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. [Citation.]" (*Wooley, supra*, 430 U.S. at pp. 716 [51 L.Ed.2d at 763-764].)

Thus the fact that plaintiff is compelled to make, rather than prohibited from making, statements which offend her religious beliefs "works no less an infringement of [her] constitutional rights. For at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and conscience rather than coerced by the State." (Fn. omitted; *Abood v. Detroit Board of Education* (1977) 431 U.S. 209, 234-235 [52 L.Ed.2d 261, 284].)

In *Abood* the court held a school board could not require teachers, as a condition of public school employment, to contribute to a union for the support of political and ideological causes which they opposed and which were unrelated to collective bargaining. (*Id.*, at pp. 235-236 [52 L.Ed.2d at pp. 284-285].) The Court noted the admonition of Thomas Jefferson that " 'to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical.' " (*Id.*, at p. 234, fn. 31 [52 L.Ed.2d at p. 284, fn. 31], citing I. Brant, James Madison: The Nationalist 354 (1948).)

It is no less tyrannical to require plaintiff to post on

her property notices which proclaim notions and ideas which are offensive to her moral and religious beliefs. (See *West Virginia State Bd. of Edu. v. Barnette, supra*, 319 U.S. at p. 646 [87 L.Ed. at p. 1641, conc. opn. of Murphy, J ["Official compulsion to affirm what is contrary to one's religious beliefs is the antithesis of freedom of worship...."].) The Commission's order forces plaintiff as part of her daily life, "to be an instrument for fostering public adherence" to a rule prohibiting discrimination against unmarried couples, a rule which plaintiff finds morally and religiously unacceptable. (*Wooley, supra*, 430 U.S. at pp. 714-716 [51 L.Ed.2d at pp. 762-763].) "In doing so, the State 'invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.' " (*Wooley, supra*; See also *Torcaso v. Watkins* (1961) 367 U.S. 488, 495- 496 [6 L.Ed.2d 982, 987-988].)[8]

---

[8] In its Return, the Commission offered to modify its order to eliminate the requirement plaintiff post in her rental units the described notices. In its supplemental brief, the Commission argues such partial remission of the penalty will eliminate any free speech issues from the case and thus any need to review the case under the more stringent standard reserved for hybrid cases as set forth in *Smith*. We disagree. We issued an alternative writ to review the decision of the Commission, which encompasses both the Commission's findings and its order. It is now too late in the day for the Commission partially to remit the penalty imposed simply to avoid review. In its decision, the Commission first noted it was entitled to take whatever action it deemed necessary to effectuate the purposes of FEHA. The decision then stated, "[W]e will order [plaintiff] to post and distribute the standard notices informing potential tenants of the outcome of this case and of their rights and remedies under [FEHA]." In response to plaintiff's claim the forced display of the notices was an unconstitutional infringement of her rights, the Commission stated: "While we are sensitive to [plaintiff's] concern, we have no ... authority to decide this constitutional issue ... and we therefore adhere to our usual remedial practice." Given the uncompromising position taken by the Commission in its decision, we find it strange if not disingenuous that the Commission

The instant case is a paradigm of the "hybrid" genus described in Smith. (*Cf. Society of Separationists, Inc. v. Herman* (5th Cir.1991) 939 F.2d 1207, 1216.) Accordingly, the state may deny plaintiff her First Amendment rights only upon showing it has an interest in protecting unmarried couples from discrimination in housing that is so compelling as to outweigh plaintiff's right, unburdened, to free exercise and free speech. (*Smith, supra*, 494 U.S. at pp. 881-882 [108 L.Ed.2d at pp. 887-888]; *Wooley v. Maynard, supra*, 430 U.S. at pp. 715-716 [51 L.Ed.2d at p. 763].)

For the state to prevail it must show the exercise by plaintiff of her First Amendment rights constitutes a grave and immediate danger to the state or to a compelling interest the state seeks to promote. (*West Virginia State Bd. of Edu. v. Barnette, supra*, 319 U.S. at p. 639 [87 L.Ed. at p. 1638].) To be compelling, " '[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation.' " (*Sherbert, supra*, 374 U.S. at p. 406 [10 L.Ed.2d at p. 972].) Plaintiff must prevail unless the state can show enforcement of the statutory scheme "is essential to accomplish an overriding governmental interest." (*United States v. Lee*, supra, 455 U.S. at pp. 257- 258 [71 L.Ed.2d at p. 132]; see also *Thomas, supra*, 450 U.S. at p. 716 [67 L.Ed.2d at p. 632].) The burden on government is a heavy

---

would now offer, "in view of the unusual circumstances of this case, and for the sake of judicial economy ...." to eliminate the notice requirements which plaintiff deemed constitutionally offensive. The Commission's post-argument brief suggests the offer to modify was extended less to promote judicial economy and more to foreclose review of its "usual remedial practice" under the heightened standard applicable to "hybrid" cases as explained in *Smith*.

one. " '[T]he essence of all that has been said and written on the subject is that only those interests of the highest order ... can overbalance legitimate claims to the free exercise of religion.' [Citation.]" (*Thomas, supra*, 450 U.S. at p. 718 [67 L.Ed.2d at p. 634].)[9]

As we shall explain California has no compelling interest in promoting the housing rights of unmarried couples such as would outweigh plaintiff's First Amendment free exercise rights.

V

California has a significant interest in eradicating discrimination in employment and housing. In 1975, provisions prohibiting sex and marital status discrimination in housing were added to the statute which previously forbade discrimination on the basis of race, creed or color. (Stats.1975, ch. 1189, pp. 2942-2948; see also [in same volume] Summary Digest, ch. 1189, p. 322.) Appellate decisions hold that "marital status" includes unmarried couples. (*Hess v. Fair Employment & Housing Com.* (1982) 138 Cal.App.3d 232, 235; *Atkisson v. Kern County Housing Authority* (1976) 59 Cal.App.3d 89, 99.)

---

[9] The necessity for a compelling state interest resonates in Justice Jackson's statement in *West Virginia State Bd. of Edu. v. Barnette, supra*, to wit:"The right of a State to regulate, for example, a public utility may well include ... power to impose all of the restrictions which a legislature may have a 'rational basis' for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. *They are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect."* (Italics added; 319 U.S. at p. 639 [87 L.Ed. at p. 1638].)

The inquiry narrows to whether California's interest in eradicating discrimination in housing against unmarried couples reaches the level of an overriding governmental interest. (See *United States v. Lee, supra*, 455 U.S. at p. 259 [71 L.Ed.2d at p. 133].) It is self-evident the Legislature cannot by statute establish that a governmental interest is so compelling as to override conflicting constitutional rights. When legislative abridgment of constitutional rights is asserted, the courts must be astute to examine the effect of the challenged legislation. (*Schneider v. Irvington* (1939) 308 U.S. 147, 161 [84 L.Ed. 155, 165].) "Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions." (*Id.* at p. 165.) "In the end, the judiciary must complete the task of determining whether a particular governmental policy is sufficiently compelling to override a claimed constitutional right." (*Gay Rights Coalition v. Georgetown Univ.* (D.C.App.1987) 536 A.2d 1, 73, conc. and dis. *opn. of Belson, J.; see* Cleburne v. Cleburne Living Center (1985) 473 U.S. 432, 440-441 [87 L.Ed.2d 313, 320-321].)

While the Legislature has proscribed discrimination on a number of grounds-- race, color, religion, sex, marital status, national origin, ancestry, familial and disability status--neither the statutory language nor legislative history indicates the Legislature intended the several proscribed grounds of discrimination be arrayed in any particular hierarchy of priorities, or that within each classification legitimate distinctions might be made. It is reasonable, however, to postulate that the Legislature did not intend all such classifications to be equal. (See *Gay Rights Coalition v. Georgetown Univ., supra*, 536 A.2d at p. 72, conc. and dis.

opn. of Belson, J.) Several factors point to this conclusion.

First, it cannot be said the goal of eliminating discrimination on the basis of unmarried status enjoys equal priority with the state public policy of eliminating racial discrimination. Racial classifications leading to different treatment always demand strict scrutiny. *(Cleburne v. Cleburne Living Center, supra,* 473 U.S. at p. 440 [87 L.Ed.2d at p. 320].) No similar level of scrutiny is demanded where discrimination is on the basis of marital status and certainly not for discrimination against unmarried couples (See *Hinman v. Department of Personnel Admin.* (1985) 167 Cal.App.3d 516, 526; *Garcia v. Douglas Aircraft Co.* (1982) 133 Cal.App.3d 890, 894).

Second, the Legislature has not extended to unmarried couples numerous rights which married couples enjoy. Citing typically the lack of legislative approval, the courts have consistently refused to treat unmarried couples as the legal equivalent of married couples. (*E.g., Elden v. Sheldon* (1988) 46 Cal.3d 267, 274-279 [unmarried person does not have cause of action either for negligent infliction of emotional distress or for loss of consortium]; (*In re Cummings* (1982) 30 Cal.3d 870 [prison regulations may properly allow conjugal visitation rights to married couples but deny them to unmarried couples]; *Marvin v. Marvin* (1976) 18 Cal.3d 660 [unmarried couples do not have a right to spousal support absent a written agreement]; *Beaty v. Truck Insurance Exchange* (1992) 6 Cal.App.4th 1455, 1461 [insurer's refusal to issue joint umbrella policy, reserved for married couples, to unmarried couple is not unlawfully discriminatory]; *Hinman v. Department of Personnel Admin., supra,* 167 Cal.App.3d at p. 530 [unmarried cohabitant is not entitled to dental benefits available to family members of state employees]; *Garcia v. Douglas Aircraft Co., supra,* 133 Cal.App.3d at p. 894

[unmarried person does not have a right to bring wrongful death action on behalf of cohabiting partner]; *Harrod v. Pacific Southwest Airlines* (1981) 118 Cal.App.3d 155 [same]; *People v. Delph* (1979) 94 Cal.App.3d 411 [unmarried couples do not have marital communication privilege under the rules of evidence].) If the need to eradicate discrimination against unmarried couples is so compelling as complainants and the Commission contend, the Legislature would have responded to these judicial decisions to extend equal rights to all cohabiting Californians. (See *Garcia v. Douglas Aircraft Co., supra*, 133 Cal.App.3d at p. 894.)

We deem the Legislature's lack of response to reflect the state's strong interest in the marriage relationship. "[T]he state's interest in promoting the marriage relationship is not based on anachronistic notions of morality. The policy favoring marriage is 'rooted in the necessity of providing an institutional basis for defining the fundamental relational rights and responsibilities of persons in organized society.' [Citation.]" (*Elden v. Sheldon, supra*, 46 Cal.3d at p. 275.)

Moreover, the legislative history suggests the Legislature's purpose in adding "marital status" to the list of proscribed bases for discrimination primarily was to protect single men and women, students, widows and widowers, divorced persons, and unmarried persons with children. Even assuming as we do (See *Hess v. Fair Employment & Housing Com., supra*, 138 Cal.App.3d at p. 235; *Atkisson v. Kern County Housing Authority, supra*, 59 Cal.App.3d at p. 99) that "marital status" in its broadest, generic sense includes unmarried couples, a hierarchy still emerges from within the classification because the state's interest in prohibiting discrimination in housing against, for example, a widower or an unmarried woman with children is more compelling than is its interest in prohibiting discrimination against unmarried

couples. To conclude otherwise would defeat the state's strong interest in promoting marriage. *(Elden v. Sheldon, supra*, 46 Cal.3d at p. 274; See *Norman v. Unemployment Ins. Appeals Bd.* (1983) 34 Cal.3d 1, 9 ["We reaffirm our recognition of a strong public policy favoring marriage. [Citation.] No similar public policy favors the maintenance of nonmarital relationships."].) In short, we find no evidence the Legislature considers the extension to unmarried couples of all rights enjoyed by married couples a compelling state interest. Whatever level such interest might occupy, it must give way to plaintiff's First Amendment right to the free exercise of religion.[10]

Finally, we note that simultaneously with the additions of "sex" and "marital status" as proscribed grounds of discrimination, the Legislature added provisions which allow public and private postsecondary educational institutions to provide accommodations limited on the basis of sex or marital status but not on the basis of race, religion, or national origin. (Stats.1975, ch. 1189, pp. 2942-2948; see also [in the same volume] Summary Digest, ch. 1189, p. 322.)[11] The Legislature

---

[10] We do not suggest that a policy in support of marriage requires a concomitant policy of hostility towards other chosen lifestyles. We simply hold the extension to unmarried couples of rights which inhere in the marriage relationship is not a state interest of the highest order.

[11] Government Code section 12995 states in relevant part: "Nothing contained in this part relating to discrimination in housing shall be construed to: [¶] ... [¶] (2) Prohibit any postsecondary educational institution, whether private or public, from providing housing accommodations reserved for either male or female students so long as no individual person is denied equal access to housing accommodations, or from providing separate housing accommodations reserved primarily for married students or for students with minor dependents who reside with them. [¶] (3) Prohibit selection based upon factors other than race, color, religion, sex, marital status, national origin, or ancestry."

has reiterated that discrimination on the basis of race or creed is intolerable, but has recognized that in certain instances discrimination on the basis, for example, of marital status is permissible given what it perceives to be the greater public benefit. Plaintiff's constitutional claims are entitled to no less deference and respect.[12]

We hold the state's proscription against discrimination in housing on the basis of a couple's unmarried status does not rank as a state interest "of the highest order." (*Wisconsin v. Yoder* (1972) 406 U.S. 205, 215 [32 L.Ed.2d 15, 25].) Given this conclusion, the state's interest must give way to plaintiff's free exercise and free speech rights as protected by the federal Constitution.

Plaintiff has been forced to choose between fidelity to her religious beliefs and renting to complainants. Choosing to follow her conscience, plaintiff has further suffered abridgement of her free speech rights. The coercive impact is real and the conflict is irreconcilable. While the compulsion may be indirect, the infringement upon fundamental rights is nonetheless substantial. Given our conclusion the policy of

---

[12] The exemption of Government Code section 12995 for postsecondary educational institutions, if applied to these complainants, would render an anomolous result. Complainant Randall was at the time of this action a student at California State University at Chico. University officials could legally have denied complainants accommodations to live together in married student housing because of their unmarried status. Yet, plaintiff's refusal to rent to complainants because of her religious beliefs has brought down on her the wrath of the state for doing the very thing the state, as landlord, could do with impunity. Thus, the state is, hypocritically, coercing plaintiff to "do as it says, not as it does."

protecting unmarried couples against housing discrimination does not rise to the level of a compelling state interest, the application of the statute implementing that policy to plaintiff must give way to plaintiff's exercise of her fundamental rights.[13]

In so holding, we are cognizant of those decisions which have concluded that in certain instances free exercise rights must give way to the greater public good. "To maintain an organized society that guarantees religious freedom to a great variety of faiths requires that some religious practices yield to the common good." (*United States v. Lee, supra*, 455 U.S. at p. 259 [71 L.Ed.2d at p. 133]; See *e.g., Braunfeld v. Brown* (1961) 366 U.S. 599, 603 [6 L.Ed.2d 563, 567] [state's interest in "improving the health, safety, morals and general well-being of ... citizens" permitted enforcement of Sunday closing laws against merchants who observed a Saturday Sabbath]; *Prince v. Commonwealth of Massachusetts* (1944) 321 U.S. 158, 165 [88 L.Ed. 645, 652] [the "interests of society to protect the welfare of children" permitted the state to apply its child labor law to bar a Jehovah's Witness from distributing religious literature on the streets].)

Of particular interest is *United States v. Lee, supra.* In Lee, a member of the Amish religious faith contended the

---

[13] The Commission's claim that accommodating plaintiff's religious beliefs runs afoul of the Establishment Clause is patently without merit. (See *Thomas, supra,* 450 U.S. at pp. 719-720 [67 L.Ed.2d at p. 635].) Complainants are free to adhere to whatever, if any, religious tenets they desire. In turn, plaintiff does not require any of her tenants to adhere to any particular religious beliefs. She simply does not rent to unmarried couples because to do so would compromise her own religious beliefs. Accordingly, plaintiff's asserted religious exemption does not involve an imposition of beliefs upon others, but rather her own attempt to refrain from, as she sees it, a sinful facilitation of immoral behavior.

payment of social security taxes for his employees would violate his religious beliefs. The Supreme Court accepted Lee's interpretation of his own Amish religious tenets, and acknowledged that compulsory participation in the social security system interfered with the free exercise rights of the Amish. (455 U.S. at p. 257 [71 L.Ed.2d at p. 134].) The court held, however, that given the government's strong interest in insuring the fiscal vitality of the social security system, the burden imposed on those Amish who employ others (as opposed to the self-employed Amish, who are exempt from participation in the social security system) is not unconstitutional. (*Id.*at pp. 258-259 [71 L.Ed.2d at pp. 134-135].)

Lee is distinguishable. It is perhaps enough to say that *Lee* was not of the hybrid variety of cases described in *Smith*. In any event, neither *Lee* nor any other case holds a person loses the First Amendment right to the free exercise of religion simply because the conflict between religious duty and governmental regulation occurs in a commercial context. To the contrary, the *Lee* court acknowledged that even in a commercial context, the state must justify a governmental regulation or "limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest. [Citations.]" (*Id.*, at pp. 257-258 [71 L.Ed.2d at p. 132].)

Moreover, in *Lee* the court addressed a challenge to participation in the social security system, a system that is "nationwide," where the government interest is "apparent" and mandatory participation "indispensable" to fiscal soundness. The court concluded the "Government's interest in assuring mandatory and continuous participation in and contribution to the social security system ... is very high." (*Id.*, at pp. 258-259 [71 L.Ed.2d at p. 133], fn. omitted.) As we have

noted, California's interest in elevating the housing rights of unmarried couples to parity with those of married couples does not amount to a compelling state interest.

Finally, the *Lee* court noted the practical consequences of allowing Lee to exclude his employees from the social security system. In essence, the court was faced with what it perceived would be the difficulty in imposing on the comprehensive social security system a myriad of exceptions flowing from a wide variety of religious beliefs. The court stated: "[T]here is no principled way, however, for purposes of this case, to distinguish between general taxes and those imposed under the Social Security Act. If, for example, a religious adherent believes war is a sin, and if a certain percentage of the federal budget can be identified as devoted to war-related activities, such individuals would have a similarly valid claim to be exempt from paying that percentage of the income tax. The tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates a religious belief. [Citations.] Because the broad public interest in maintaining a sound tax system is of such a high order, religious belief in conflict with the payment of taxes affords no basis for resisting the tax." (455 U.S. at p. 260 [71 L.Ed.2d at p. 134].)

The instant case does not raise the spectre of floodgates opened to a myriad of exemptions from the state anti-discrimination law. To the contrary, we are confronted with a single landlord with two duplexes whose religious convictions will be violated if she is forced to rent her premises to unmarried couples. There is nothing in the record to indicate the number of landlords similarly circumstanced is so great as to cause a serious shortage of housing for unmarried couples. There likewise is no evidence in the record

to indicate landlords all over the state will suddenly experience religious conversions in order to obtain exemption from the statutory proscription of discrimination on the basis of marital status. In fact, the economic interests of landlords as a class would counsel otherwise.

Moreover, while the discrimination practiced against complainants is real, it is hardly burdensome. Complainants lived together for five years prior to the time they sought to rent from plaintiff and there is nothing in the record to suggest that during that time they suffered housing discrimination as a result of their unmarried status or that they were ever unable to obtain adequate housing. There likewise is no evidence that in securing housing following plaintiff's refusal to rent to them, complainants were frustrated by marital status discrimination. Indeed, in light of dominant community mores, it is entirely likely complainants could live together unmarried for the rest of their lives and never again confront discrimination because of their unmarried status. (See generally *Elden v. Sheldon, supra,* 46 Cal.3d at p. 273 and fn. 3; *Marvin v. Marvin*, supra, 18 Cal.3d 665, 684 and fn. 1.)

VI

Article I, section 4 of the California Constitution provides the "[f]ree exercise and enjoyment of religion without discrimination or preference are guaranteed. This liberty of conscience does not excuse acts that are licentious or inconsistent with the peace or safety of the State. The Legislature shall make no law respecting an establishment of religion...."

"[S]tate courts cannot rest when they have afforded their citizens the full protections of the federal Constitution. State constitutions, too, are a font of individual liberties, their

protections often extending beyond those required by the Supreme Court's interpretation of federal law." (Brennan, State Constitutions and the Protection of Individual Rights (1977) 90 Harv.L.Rev. 489, 491.) "[A] state court is entirely free ... to reject the mode of analysis used by [the United States Supreme Court] in favor of a different analysis of its corresponding constitutional guarantee." (*City of Mesquite v. Aladdin's Castle, Inc.* (1982) 455 U.S. 283, 293 [71 L.Ed.2d 152, 162]; See also *Gabrielli v. Knickerbocker* (1938) 12 Cal.2d 85, 89-92 [free exercise claims must be considered under both the state and federal Constitutions].)

We may interpret our state Constitution to offer greater protection of individual rights than does the federal Constitution. (*Pruneyard Shopping Center v. Robins* (1980) 447 U.S. 74, 81 [64 L.Ed.2d 741, 752]; *Oregon v. Hass* (1975) 420 U.S. 714, 719 [43 L.Ed.2d 570, 575]; *People v. Brisendine* (1975) 13 Cal.3d 528, 550-551.) The courts of this state are "independently responsible for safeguarding the rights of [our] citizens." (*People v. Brisendine, supra*, 13 Cal.3d 528, 551.) "State courts are, and should be, the first line of defense for individual liberties in the federal system." (*Sands v. Morongo Unified School Dist.* (1991) 53 Cal.3d 863, 906, conc. opn. of Mosk, J. (hereafter cited as Sands.); *cf. State of Oregon v. Kennedy* (Or.1983) 666 P.2d 1316, 1323 [State constitutional guarantees were "meant to be and remain genuine guarantees against misuse of the state's governmental powers, truly independent of the rising and falling tides of federal case law both in method and in specifics."].)

The California Constitution is the supreme law of our state--a seminal document of independent force that establishes governmental powers and safeguards individual rights and liberties. [Citations.]" (*Sands, supra*, 53 Cal.3d 863, 902-903, conc. opn. of Lucas, C.J.) It is for the courts of this state to

determine the meaning of state constitutional provisions, with the state Supreme Court being the "final arbiter[ ] [thereof]." (*Sands, supra*, at p. 903.) This responsibility devolves from "the basic structure of California government; it cannot be delegated to the United States Supreme Court or any other person or body." (*Sands, supra*, at p. 903.) When the courts of this state construe provisions of the California Constitution, they do so "in light of their unique language, purpose and histories, in accordance with general principles of constitutional interpretation established in our case law. Nor do [the courts] act differently when the state constitutional provision in issue contains the same language as a federal constitutional provision. In such a case, [the courts] are not bound by a decision of the United States Supreme Court or any other court. [They] must consider and decide the matter independently." (*Sands, supra*, 53 Cal.3d at pp. 903, 907, conc. opn. of Mosk, J. ["It is undisputed that provisions of the California Constitution are not dependent for their meaning on the federal Constitution." (Citing Cal. Const., art. I, § 24.)

California Constitution Article I, section 4, is broader than its federal counterpart. (See 7 Witkin, Summary of Cal. Law (9th ed. 1988) Constitutional Law, s 371, p. 539.) "[O]ur state Constitution contains an express guaranty of freedom of religion ... [while] [t]he federal Constitution does not contain a similar express provision...." (*Gabrielli v. Knickerbocker, supra*, 12 Cal.2d at p. 89.) The First Amendment bars government action prohibiting free exercise of religion. The California Constitution guarantees both freedom of exercise and enjoyment of religion. Any action that is neither "licentious [nor] inconsistent with the peace or safety of the State" is "guaranteed" protection. (Cal. Const., art. I, § 4; *cf. First Covenant Church v. Seattle, supra*, 840 P.2d at p. 186; *State v. Hershberger* (Minn.1990) 462 N.W.2d 393, 397.[A.L.R.4th 1745].)

The framers of our state Constitution placed a high value on religious liberty. Article I, section 4 as originally adopted in 1849, stated in pertinent part: "The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this State...." The 1879 Constitutional Convention strengthened the original provision by substituting the word "guaranteed" for "allowed." Explaining the change, Mr. O'Sullivan, a delegate to the convention, commented: "I propose this amendment, because it is quite evident that the word 'allowed' conveys the idea that the right to disallow or deny exists. Now, sir, I deny that any Government or any power on earth has a right to grant or deny freedom of religious belief ... Our Government, being republican, should guarantee full liberty to the citizen in his actions. 'Guarantee,' therefore, is the proper word...." (Debates and Proceedings, Cal. Const. Convention 1878-1879, p. 1171.)

By guaranteeing not only the free exercise but also the enjoyment of religion, our state Constitution affords Californians greater protection for religious liberties against governmental action than does the First Amendment of the federal Constitution. (*Cf. State v. Hershberger, supra*, 462 N.W.2d at p. 397; *State of Minn. by Cooper v. French* (Minn.1990) 460 N.W.2d 2, 9.) As our state high court has noted, "the right to free religious expression embodies a precious heritage of our history." (*People v. Woody, supra,* 61 Cal.2d at p. 727.) It is thus the duty of the courts of this state to ensure that only the most compelling of state interests be allowed to narrow or restrict the free exercise right. (*Woody, supra*, at pp. 722-725; See *State of Minn. by Cooper v. French, supra*, 460 N.W.2d at p. 9.)

Because of its broader scope, we interpret the state constitutional guarantee of free exercise and enjoyment as

placing a heavier burden on the state to justify its infringement than does the First Amendment to the federal Constitution as interpreted in Smith. Accordingly, a claim of infringement of free exercise and enjoyment as guaranteed by the state Constitution, regardless of whether that claim implicates other constitutional rights as well, must be considered under the strict scrutiny/compelling state interest analysis of *Sherbert, supra*, and *Woody, supra*. (See *Walker v. Superior Court* (1988) 47 Cal.3d 112, 139-141; *Molko v. Holy Spirit Assn., supra*, 46 Cal.3d at p. 1113; and See *Auto Equity Sales v. Superior Court* (1962) 57Cal.2d 450, 455.)[14]

As we outlined in our discussion of plaintiff's hybrid free exercise claim under the First Amendment, California has no compelling interest in prohibiting housing discrimination against unmarried couples such as would outweigh plaintiff's state constitutional free exercise claim. Thus, under either the hybrid scenario posited in *Smith*, or the traditional analysis used to examine claims arising under the state free exercise constitutional guaranty, the same result obtains: plaintiff may not be forced to violate her religious beliefs in order to advance the state's interest in eradicating discrimination in

---

[14] This conclusion is consistent with decisions of our sister state courts. (See e.g., *State v. Hershberger, supra*, 462 N.W.2d 393, 397- 399 [Because of the high value placed on religious liberty in the Minnesota constitution, free exercise claims arising thereunder can be overridden only by a compelling state interest]; *State of Minn. by Cooper v. French, supra*, 460 N.W.2d 2 [same]; *First Covenant Church v. Seattle, supra*, 840 P.2d at pp. 191-193 [The free exercise clause of the Washington state constitution reflects the state's long history of extending strong protection to the free exercise of religion; thus, free exercise may be infringed only by a compelling state interest].

housing against unmarried couples.[15]

VII

Plaintiff relies on the Religious Freedom Restoration Act of 1993 (RFRA) (42 U.S.C. § 2000bb, et seq; see Pub. Law 103-141 [H.R. 1308], effective Nov. 16, 1993), enacted by Congress to restore the level of protection for religious freedom that existed prior to the United States' Supreme Court decision in *Smith.*[16] RFRA, which applies retroactively to all cases pending at the time of its enactment (42 U.S.C. § 2000bb-3, subd. (a)), was clearly intended to reverse the impact of *Smith* by creating a statutory right requiring the compelling state interest test to be applied in all cases in which the free exercise of religion has been burdened by a law of

---

[15] In *Swanner v. Anchorage Equal Rights Com'n.*, (Alaska 1994) 868 P.2d 301, the Alaska Supreme Court held a landlord's free exercise claim premised on the Alaska Constitution was outweighed by the state's compelling interest in eradicating discrimination in housing against unmarried couples. (868 P.2d at pp. 307-310.) We agree with the dissent in *Swanner,* which would have upheld the landlord's free exercise claim. (See *id.*, at 312-317 (dis. Opn. Of Moore, C.J.).)

[16] As the court noted in *Hunafa v. Murphy* (7th Cir.1990) 907 F.2d 46, 48, "Smith cut back, possibly to minute dimensions, the doctrine that requires government to accommodate ... minority religious preferences [.]" (*See also Yang v. Sturner* (D.R.I.1990) 750 F.Supp. 558, 560 ["One must wonder ... what is left of Free Exercise jurisprudence when one can attack only laws explicitly aimed at a religious group."]; *see also Smith, supra,* 494 U.S. at p. 908 [108 L.Ed.2d at p. 905] dis. opn. of Blackmun, J. [Smith "effectuates a wholesale overturning of settled law concerning the Religion Clauses of our Constitution."]; and See *Church of Lukumi v. Hialeah* (1993) 508 U.S. [124 L.Ed.2d 472, 512, conc. opn. of Souter, J [describing the hybrid distinction posited in *Smith* as unworkable and "ultimately untenable"].)

general applicability.[17]

[17] 42 U.S.C. s 2000bb-1 states:"(a) IN GENERAL.--Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).

"(b) EXCEPTION.--Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person--

"(1) is in furtherance of a compelling governmental interest; and

"(2) is the least restrictive means of furthering that compelling governmental interest.

"(c) JUDICIAL RELIEF.--A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution."

That Congress intended the RFRA to restore pre-*Smith* analysis is apparent from a report of the House Judiciary Committee: "For many years and with very few exceptions, the Supreme Court employed the compelling governmental interest test [in deciding free exercise claims]. The *Smith* majority[']s abandonment of strict scrutiny represented an abrupt, unexpected rejection of longstanding Supreme Court precedent.... [P] The effect of the Smith decision has been to subject religious practices forbidden by laws of general applicability to the lowest level of scrutiny employed by the courts. Because the 'rational relationship test' only requires that a law must be rationally related to a legitimate state interest, the *Smith* decision has created a climate in which the free exercise of religion is continually in jeopardy....

It is the Committee[']s expectation that the courts will look to free exercise of religion cases decided prior to *Smith* for guidance in determining whether or not religious exercise has been burdened and the least restrictive means have been employed in furthering a compelling governmental interest.... Therefore, the compelling governmental interest test should be applied to all cases where the exercise of religion is substantially burdened; however, the test generally should not be construed more stringently or more leniently than it was prior to *Smith*. (Italics added; Report 103-88, 103rd Congress, 1st Session, House of Representatives' Judiciary Committee, pp. 3, 6, 7, and

As we have noted, plaintiff's free exercise claims, whether analyzed under *Smith* as a hybrid claim under the First Amendment or under the broader free exercise clause of the California Constitution, must be subjected to the compelling state interest test. Thus, RFRA affords plaintiff no greater protection than that to which she is already entitled.

VIII

We address complainants' contention that inquiry into their marital status violated their state constitutional right to privacy. Article I, section 1 of the California Constitution provides: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy." This constitutional provision creates a right of action against private as well as government entities. (*Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 20, hereafter cited as *Hill.*)[18]

The complainants' privacy claim fails for numerous reasons. Indeed, to the extent it is interposed to defeat plaintiff's First Amendment rights, it necessarily fails. A federal right, created by statute or by the federal Constitution, is not trumped by a state constitutional provision. *(Northwest*

---

see p. 15 ["[T]he purpose of the statute is to turn the clock back' to the day before Smith was decided."]

[18] For good reason, complainants do not raise a claim of violation of their federal constitutional right to privacy. *(See Griswold v. Connecticut* (1965) 381 U.S. 479 [14 L.Ed.2d 510].) The federal right to privacy protects individuals from unconstitutional governmental action. *(See Eisenstadt v. Baird* (1972) 405 U.S. 438, 453 [31 L.Ed.2d 349, 362].)

BEST AVAI

Pipeline v. Kan. Corp. Com. (1989) 489 U.S. 493, 509 [103 L.Ed.2d 509, 526- 527]; *Garnett v. Renton School Dist. No. 403* (9th Cir.1993) 987 F.2d 642, 646.) If, as we have determined, plaintiff's hybrid First Amendment rights permit her to refuse to rent to unmarried couples, it follows inexorably therefrom that plaintiff may lawfully inquire of prospective tenants as to their marital status.

Complainants' privacy claim fails even when considered as against plaintiff's state constitutional guarantee of the free exercise and enjoyment of religion. In *Hill, supra*, the California Supreme Court held that one who alleges an invasion of privacy in violation of the state constitutional provision must establish each of the following: "(1) a legally protected privacy interest; (2) a reasonable expectation of privacy in the circumstances; and (3) conduct by defendant constituting a serious invasion of privacy...." (7 Cal.4th at pp. 39-40)

Complainants assert the state constitutional right to privacy permits them to choose the living companion of their choice. *(See City of Santa Barbara v. Adamson* (1980) 27 Cal.3d 123, 130.) They also assert a legally protected privacy interest in their marital status. (See generally *Atkisson v. Kern County Housing Authority, supra*, 59 Cal.App.3d at pp. 98-100.) Both claims are well-taken. However, under the facts herein, neither privacy right was breached.

Plaintiff did no more than inform complainants, as prospective tenants, that because of her religious beliefs she preferred to rent to married couples and in fact would not rent to an unmarried couple. Plaintiff did not inquire of complainants' marital status, nor did she seek confirmation of that status when complainants falsely represented they were married. When complainants later volunteered to plaintiff that

LABLE COPY

they were in fact not married, plaintiff thanked them for their honesty and returned their deposit.[19]

"No community could function if every intrusion into the realm of private action, no matter how slight or trivial, gave rise to a cause of action for invasion of privacy.... Actionable invasions of privacy must be sufficiently serious in their nature, scope, and actual or potential impact to constitute an egregious breach of the social norms underlying the privacy right. Thus, the extent and gravity of the invasion is an indispensable consideration in assessing an alleged invasion of privacy." (*Hill, supra*, 7 Cal.4th at p. 37.)

Plaintiff's announcement of her rental policy can be characterized in many ways: polite, respectful, considerate, tactful. It cannot reasonably be characterized as an infringement on or an invasion of complainants' right to privacy.

Finally, even if complainants could somehow demonstrate plaintiff's conduct constituted an invasion of privacy, their privacy claim would still fail. As the *Hill* court held, even a substantial invasion of privacy may be justified where the invasion "substantively furthers one or more countervailing interests." (7 Cal.4th at p. 40.) "Invasion of a privacy interest is not a violation of the state constitutional right to privacy if the invasion is justified by a competing interest.... Conduct alleged to be an invasion of privacy is to

---

[19] Plaintiff did inquire about the duration of complainants, marriage, but did so only after complainants had volunteered they were in fact married. Such an inquiry could hardly be labeled a serious invasion into an aspect of their lives that complainants, under the circumstances, could reasonably have expected to remain beyond the bounds of legitimate inquiry. *(See Hill, supra,* 7 Cal.4th at pp. 39-40.)

BEST AVAIL

be evaluated based on the extent to which it furthers legitimate and important competing interests." (*Id.*, at p. 38.)

We need not repeat our discussion concerning the scope of the free exercise right plaintiff enjoys under both the federal and state Constitutions. Suffice it to say, such free exercise right is of the highest order. (*Thomas, supra*, 450 U.S. at p. 718 [67 L.Ed.2d at p. 634].) Complainants' privacy right, which under these facts is de minimis, is outweighed by plaintiff's protected and guaranteed rights to the free exercise and enjoyment of her religion.

"No provision in our Constitution ought to be dearer to man than that which protects the rights of conscience against the enterprises of the civil authority." (The Writings of Thomas Jefferson: Replies to Public Addresses: To the Society of the Methodist Episcopal Church at New London, Connecticut, on February 4, 1809 (Monticello ed.1904) vol. XVI, 331, 332.)

Our decision today simply recognizes that the interests here advanced by the state do not justify the burden they would entail on plaintiff's freedom of religion. While California may have a significant interest in eradicating discrimination in housing based on marital status, that interest is not so compelling as to justify the burden it would impose on plaintiff's free exercise of her religious liberty.[20] Nor has the

---

[20] California regularly exempts religious objectors from laws of general applicability. (*See e.g., People v. Woody, supra*, 61 Cal.2d at pp. 723-727 [Indians who ingest peyote for religious purposes are exempt from California criminal drug laws]; Health & Saf.Code, s 25955, subd. (a) [exempting doctors and nurses from performing abortions if opposed on religious grounds]; Health & Saf.Code, s 3385 [public school students exempted from immunization requirements if opposed on religious

BLE COPY

state sustained its burden of proving the accommodation of plaintiff's free exercise rights constitutes a grave or immediate danger to any interest which it has an overriding need to protect.[21]

Let a writ of mandate issue directing the Commission to vacate its decision and to dismiss the accusation and complaint against plaintiff with prejudice. Plaintiff is to recover her costs on appeal.

SCOTLAND, J., concurs.

RAYE, J. -- I concur in the majority's conclusion that application of the Fair Employment and Housing Act under the specific facts of this case violates petitioner's rights under the California Constitution. Unlike victims of race or sex discrimination, complainants cannot assert a countervailing constitutional right and have failed to establish the statutory protections afforded unmarried couples reflect a compelling state interest.

I disagree, however, with the majority's effort to create a "hybrid situation" within the meaning of *Employment Division v. Smith, supra*, 494 U.S. 872 by linking petitioner's free exercise claim with a first amendment free speech claim

---

grounds]; Ed.Code, s 51550 [public school students cannot be forced to attend sex education classes]; Code Admin. Regs., tit. 22, s 1256-6 [workers who cease employment due to personal religious beliefs are entitled to unemployment compensation.].)

[21] In light of our determination, the finding that plaintiff's conduct constituted a form of arbitrary discrimination by a business establishment in violation of Civil Code section 51 and Government Code section 12948 must yield to plaintiff's paramount right to free exercise and enjoyment of religion. (See footnote 2, *ante*, p. 4.)

which only arises by virtue of the remedy imposed by the Commission. Assuming an order directing petitioner to post a notice describing provisions of a statute violates petitioner's free speech rights, the violation is clearly severable from the purported free exercise claim; we could simply strike that portion of the order. In any event, the federal constitutional analysis is unnecessary given the application of California's constitutional provisions on the free exercise and enjoyment of religion.

BEFORE THE FAIR EMPLOYMENT AND HOUSING COMMISSION
OF THE STATE OF CALIFORNIA

In the Matter of the Accusation of the	)	
	)	Case Nos. FHL86-87
DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING	)	E4-0027
	)	FHL87-88
	)	E5-0058
v.	)	N-30956
	)	89-11
EVELYN SMITH,	)	
	)	DECISION
Respondent.	)	
	)	
KENNETH C. PHILLIPS and GAIL RANDALL,	)	
	)	
Complainants.	)	

On April 25 and 26, 1988, in Chico, California, Karl S. Engeman, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter.

Jonathan Lew, Staff Counsel, and Philip Weverka, Law Clerk, represented the Department of Fair Employment and Housing (hereinafter the "Department").

Jordan Lorence, Assistant General Counsel, and Cimron Campbell, Senior Staff Attorney, Concerned Women for America Education and Legal Defense Foundation, represented Evelyn Smith (hereinafter "respondent").

The Commission received the proposed decision and hearing transcript on December 9, 1988. The Commission decided not to adopt the proposed decision and, on March 13,

1989, notified the parties of the opportunity to file further written argument by April 14, 1989. The Department and respondent waived further argument.

After consideration of the entire record and all arguments, the Commission makes the following findings of fact, determination of issues, and order.

FINDINGS OF FACT

1. On or about April 17, 1987, complainant Kenneth C. Phillips filed a verified complaint in writing with the Department alleging that respondent Evelyn Smith committed an act of housing discrimination in violation of the Fair Employment and Housing Act (FEHA) and the Unruh Civil Rights Act (Unruh Act). The complaint alleged that Phillips was denied rental of a one-bedroom unit owned by respondent because of his marital status (unmarried) and because of his membership in a class of people who are single. An answer to the complaint was filed with the Department on or about June 1, 1987.

2. On or about January 27, 1988, complainant Gail Randall a verified complaint in writing with the Department alleging that respondent committed an act of housing discrimination in violation of the FEHA and Unruh Act. Complainant Randall alleged that she was denied rental of a one-bedroom unit owned by respondent because of her marital status (unmarried) and because of her membership in a class of people who are single.

3. On February 22, 1988, Talmadge R. Jones, in his official capacity as the Director of the Department, issued two accusations against respondent based on complainants' complaints. The accusation based on complainant Phillips's

complaint alleged violations of Government Code sections 12948, 12955, subdivision (a), and 12955, subdivision (d), and Civil Code section 51. The accusation based on complainant Randall's complaint alleged violations of Government Code section 12948 and Civil Code section 51. The Randall accusation was later amended on or about March 4, 1988 to allege, in addition, violations of Government Code sections 12955, subdivisions (a), (b), (c), and (d). A timely notice of defense was returned.[1]

4. Respondent owns and leases four rental units located at 675, 677, 683 and 685 Eastwood Avenue, Chico, California. They are operated exclusively for business and commercial purposes, with income generated from the rentals reported as business income. The business is not organized or classified as a religious, charitable or other nonprofit concern. Respondent does not reside in any of the four units and visits the units occasionally to maintain them.

5. When a vacancy occurs in one of the units, the unit is advertised for rent in local newspapers and is otherwise available to the general public. When prospective tenants inquire about a vacant unit, respondent tells them she prefers married couples. She prefers married couples because, for religious reasons, she opposes sex outside of marriage. However, since she has received so many calls from unmarried couples seeking to rent her units, she simply tells prospective tenants that she prefers to rent to married people.

6. Respondent is a Christian. She is a member of Bidwell Presbyterian Church in Chico and has attended there

---

[1] Upon the Department's motion on April 13, 1988, these matters were consolidated for hearing.

for approximately 25 years. Respondent believes that sex outside of marriage is sinful, and that it is a sin for her to rent her units to people who will engage in nonmarital sex on her property. Respondent believes that God will judge her if she permits people to engage in sex outside of marriage in her rental units and that if she does so, she will be prevented from meeting her deceased husband in the hereafter.

7. Respondent has rented her units to single, divorced and widowed persons. Respondent has no religious objection to renting to people who are single, divorced, widowed or married. Respondent would not rent to anyone who engages in sex outside of marriage, whether they are single, divorced, widowed or married. Respondent rents her units to people without regard to their race, color, national origin, ancestry, or physical handicap. Respondent rents her units without regard to the religious beliefs of tenants. She does not know the religious background of most of her tenants because she never asks them and only knows if they volunteer the information. Respondent has rented her units to males and females and does not discriminate on the basis of sex.

8. From on or about March 29, 1987, to April 13, 1987, respondent advertised the availability of one of her units in the Chico Enterprise-Record. Complainants saw the advertisement on April 1, 1987, and drove by the unit that night. Because of the particular neighborhood, attractive architecture, convenient location and well maintained premises, complainants took a special interest in the unit and the next morning called respondent and arranged to see it. During this telephone conversation respondent stated that she preferred to rent to married couples.

9. On or about April 2, 1987, complainants met with respondent and were shown the premises, which they liked very

much. Respondent told complainants that she would not rent to unmarried couples, and she asked complainants how long they had been married. Complainant Phillips falsely represented to respondent that he and complainant Randall were married. Complainants made no commitment to rent at that time and filled out an informal application for respondent. Complainant Randall signed her name, "Gail Phillips" on that document.

10. Later, complainants called respondent and told respondent they were interested in renting the unit. They met with respondent on or about April 7, 1987. A lease agreement was executed between the parties on that date for the unit located at 677 Eastwood Avenue. It was for a month-to-month tenancy commencing May 1, 1987 at a rent of $325 per month. Complainants also paid respondent a security deposit of $150 for which a receipt was given. Complainant Randall signed the lease agreement, "Gail Phillips." During this meeting, respondent told complainants again that she would not rent to unmarried couples.

11. Later in the day on April 7, 1987, complainant Randall called respondent and asked if respondent doubted that Randall and Phillips were married. Randall asked respondent if she wanted to see their marriage license. Respondent said, "No." Still later on the same day, complainant Phillips called respondent and told her that he and Randall were not married. Respondent told him that she could not rent to an unmarried cohabiting couple because that would violate her religious beliefs. Respondent said that she would return their deposit. She sent them a check for $150.

12. At the time that respondent declined to rent the unit to complainants, they were living in a one-bedroom apartment in Chico, California. They had a month-to-month tenancy

which they could terminate with 30 days notice to the landlord. After respondent declined to rent them her unit, they continued their search for another place to live. In late April of 1987, they obtained a list of available rentals in the Chico area from a rental agency for $25. They looked at approximately 30 available rentals between the first part of April and the first part of June in 1987. None of the units was acceptable to them. They suspended their search during the summer of 1987 because Randall left the Chico area to work elsewhere. They resumed their search in September of 1987, having obtained a second list from a rental agency, the cost of which was not established by the evidence. Having exhausted most of the available rentals in Chico in their price range, they began to look in a wider area. In or about December of 1987, they found and leased a one-bedroom house in Paradise, California for $400 per month. Paradise is approximately thirty miles from Chico.

13. During the spring of 1987, when Randall and Phillips were searching for a place to live after respondent declined to rent them her unit, Phillips and Randall were working together and sharing the profits from Phillips' landscaping business. The time taken by them to look at the rentals was time that they would otherwise have spent on the business. At that time, they both charged business customers approximately $14 per hour. They spent approximately thirty minutes looking at each unit. They also used the pickup truck normally used by Phillips in the operation of the landscape business and traveled an average of one and a half miles for each visit. The cost of operating the pickup truck was approximately 21¢ per mile.

14. Randall became a full-time student at California State University, Chico in the spring of 1987. When she and Phillips moved to Paradise in or about December of 1987, she

was required to commute on a daily basis to her classes. However, about half of Phillips' landscape maintenance contracts were in the Paradise area, to which he would otherwise have had to commute had he rented the unit from respondent. Complainants spend a good deal of time in Chico on social outings because they are more comfortable among its younger inhabitants than they are in Paradise, a retirement community.

15. Randall and Phillips liked respondent's unit very much, and they were upset and angry after respondent declined to rent it to them. Respondent's refusal to rent to them the unit based on the fact that they were an unmarried couple revived unpleasant feelings experienced by Randall when her parents had expressed their disapproval of her living with Phillips.

DETERMINATION OF ISSUES

Jurisdiction

The Department of Fair Employment and Housing is an administrative agency empowered to issue accusations under sections 12930, 12965, and 12981 of the FEHA, California Government Code sections 12900 et seq.

The FEHA incorporates the Unruh Act, California Civil Code section 51 et seq., in California Government Code section 12948.

Respondent Smith owns a single family dwelling located at 677 Eastwood Avenue, Chico, California, and is an owner of a housing accommodation within the meaning of Government Code section 12927, subdivisions (d) and (e). Respondent maintains the premises as a business establishment as defined by California Civil Code section 51.

On or about April 17, 1987, complainant Kenneth C. Phillips filed a complaint in writing with the Department, pursuant to California Government Code sections 12960 and 12980, alleging that respondent Smith had committed an unlawful practice against him in violation of the FEHA within the preceding one-year period. On or about January 27, 1988, complainant Gail Randall filed a complaint in writing with the Department, pursuant to California Government Code sections 12960 and 12980, alleging that respondent Smith had committed an unlawful practice against her in violation of the FEHA within the preceding one-year period.

The Department issued accusations based on these complaints on February 22, 1988, and respondent returned a notice of defense. The accusation based on complainant Phillip's complaint alleged violations of Government Code section 12955, subdivisions (a) and (d), and Government Code section 12948 and Civil Code section 51. This accusation was never amended. The accusation based on complainant Randall's complaint originally alleged only a violation of Government Code section 12948 and Civil Code 51, but was later amended to add alleged violations of subdivisions (a) through (d) of Government Code section 12955.

These additional allegations -- of violations of subdivisions (a) through (d) of section 12955 as to complainant Randall -- are defective. The complaint on which they rest was filed long after the 60-day filing deadline the FEHA imposes on complaints of violations of section 12955 (Gov. Code, §12980), and we will therefore dismiss this portion of the Randall accusation.

Randall's complaint was, however, filed well within the one-year filing deadline for section 12948 complaints (Gov. Code, §12960), so the allegations of a violation of that section

and Civil Code section 51 will stand. Complainant Phillips's complaint was timely as to both its section 12948 and its section 12955 allegations, and the entire accusation based on this complaint is therefore valid. Because this accusation does not allege violations of subdivisions (b) or (c) of section 12955, however, no such allegations remain against respondent, and we will therefore not determine whether such violations have occurred here.

With the exception just noted, we determine that all other procedural requirements of the FEHA have been met and that we have jurisdiction over respondent in this matter.

Liability

The Department asserts that respondent unlawfully discriminated against complainant Phillips because of his marital status in violation of section 12955, subdivisions (a) and (d), of the FEHA and that respondent was guilty of an unlawful practice as defined by section 12948 of the FEHA by reason of her discrimination against him in the provision of housing accommodations in violation of section 51 of the Civil Code. The Department also asserts that respondent discriminated unlawfully against complainant Randall in violation of Government Code section 12948 and Civil Code section 51. With respect to each of these claims, respondent will be found liable under the FEHA if it is determined, first, that her actions constitute discrimination under the FEHA, and if so, that this conduct is not excused or justified by an affirmative defense.

A. Discrimination

1. Section 12955 Claims

The Department claims first that respondent violated section 12955, subdivisions (a) and (d) of the FEHA by refusing to rent to complainant Phillips because of his "marital status." Such discrimination is established if a preponderance of all the evidence demonstrates that Phillips's marital status was in any part the cause of his rejection by respondent. (DFEH v. Merribrook Apartments (1988) FEHC Dec. No. 88-19, at p. 11 [1988-89 CEB 7]; DFEH v. Davis Realty Co. (1987) FEHC Dec. No. 87-02, at p. 18 [1986-87 CEB 5]; DFEH v. Neugenbauer (1980) FEHC Dec. No. 80-14, at pp. 5-6 [1980-81 CEB 6].)

Respondent contends that her refusal to rent to Phillips was not based on his marital status but on respondent's objection, based on religious grounds, to what she presumed would be sexual activity in her unit by complainants, while unmarried. In support of her contention, respondent cites cases decided in other jurisdictions which have held that marital status laws which prohibit housing discrimination do not protect cohabiting unmarried couples.[2]

---

[2] See Prince George's County v. Greenbelt Homes, Inc., (1981) 49 Md.App. 314, 431 A.2d 745 (refusal to sell house to unmarried cohabiting couple not marital status discrimination); McFadden v. Elma Country Club (1980) 26 Wash.App. 195, 613 P.2d 146 (refusal of country club to sell land to unmarried cohabiting couple not marital status discrimination); Hudson View Properties v. Weiss (1983) 59 N.Y.S.2d 428, 450 N.E.2d 234 (lease restricting occupancy to tenants and their immediate family but not unmarried cohabiting couples not marital status discrimination). Respondent concedes that the State of Minnesota has held that "marital status" laws do protect unmarried cohabiting couples. (State by Johnson v. Porter Farms, Inc. (Minn.App. 1986) 382 N.W.2d 543).

However, the Commission and California courts have taken the opposite view. (Hess v. Fair Employment & Housing Com. (1982) 128 Cal.App.3d 232, affirming DFEP v. Hess (1980) FEHC Dec. No. 80-10 [1980-81 CEB 3]; Atkisson v. Kern County Housing Authority (1976) 59 Cal.App.3d 89, 99; DFEH v. Boy Scouts of America (1981) FEHC Dec. No. 81-15, at pp. 7-10 [1980-81 CEB 26].)

In Atkisson, the Kern County Housing Authority promulgated a rule forbidding low income tenants from living with anyone of the opposite sex not related by marriage or otherwise. The rule was based upon the Housing Authority's view that:

a) Such cohabitation is immoral;

b) That such cohabitation results in a continuous turnover of cohabitants which results in management problems such as computation of rents;

c) [Housing Authority's] view that its 31 years of experience makes clear that (1) a cohabitant tenant is or becomes less responsible to respondents, and (2) is a poor influence on the cohabitant tenants as families; and

d) [Housing Authority's] view that unless cohabitation is prohibited, there will be (1) a demoralizing effect on tenancy relations, and (2) the number of cohabitants could not be controlled. (Atkisson v. Kern County Housing Authority, supra, 59 Cal.App.3d at p. 93.)

In addition to holding that the Housing Authority's policy regulation was unconstitutional and invalid as violative of due process and equal protection of law, the court held the policy regulation violated California Health and Safety Code

section 35720 (the predecessor of Government Code section 12955) which prohibited evictions from or denials of publicly assisted housing on the basis of marital status. The policy regulation was therefore unlawful. (Id. at p. 99.)

The Commission has explicitly recognized the holding in Atkisson in DFEH v. Boy Scouts of America, supra, 1980-81 CEB 26, in which we ruled that refusal to hire a person because of his unmarried cohabitation constitutes a violation of the FEHA's prohibition of discrimination in employment because of marital status (Gov. Code, §12940). As one ground for that ruling, we cited the Atkisson holding and stated that the "ban on marital status discrimination in housing includes within its ambit unmarried cohabitation." (*Id.* at p. 9.)

The Hess case involved the refusal to rent a duplex to an unmarried couple based on the landlords' application of a financial criterion which was different than that applied to married couples. More specifically, the Hesses required each person of an unrelated couple to separately qualify financially to rent the duplex while only one spouse of a married couple had to so qualify. Citing Atkisson for the proposition that the FEHA prohibition against discrimination against unmarried couples, the court held that this practice of the landlords violated the FEHA. (Hess v. Fair Employment and Housing Com., supra, 138 Cal.App.3d at p. 235.)

Here, there was no dispute between the parties that respondent, upon learning that complainants Phillips and Randall were not married, refused to rent them the unit sought by them. Complainant Phillips's marital status was thus the sole cause of his rejection, and were therefore determine that respondent discriminated against him within the meaning of section 12955, subdivisions (a) and (d) of the FEHA.

2. Section 12948 Claims

The Department also asserts that respondent's refusal to rent to complainants because of her disapproval of their unmarried cohabitation constitutes discrimination in violation of the Unruh Act and section 12948 of the FEHA, whether or not such conduct constitutes discrimination because of "marital status" within the meaning of section 12955. We agree.

While section 51 of the Civil Code does not list unmarried cohabitants or any other category based on "marital status" among the classifications protected from unlawful denial of full and equal accommodations in all business establishments, the California Supreme Court has held that the Unruh Act language and legislative history indicate an intent to prohibit all arbitrary discrimination by business establishments. (In re Cox (1970) 3 Cal.3d 205, 216; Marina Point, Ltd. v. Wolfson, (1982) 30 Cal.3d 721, 732.) Identification of particular bases of discrimination -- color, race, religion, ancestry and national origin -- is illustrative rather than restrictive. (Ibid.) There is no question, therefore, that discrimination in housing because of unmarried cohabitation does constitute a denial of equal accommodations within the meaning of the Unruh Act and section 12948 of the FEHA.

As with refusals to rent under section 12955, subdivision (a), discrimination of this kind under section 12948 is established if it is demonstrated that unmarried cohabitation was in any part the cause of complainants' rejection by respondent. (DFEH v. Merribrook Apartments, supra, 1988-89 CEB 7, at p. 14.) As we stated above, the fact that complainants would live together while unmarried was agreed to be the sole cause of their rejection, and we therefore determine that respondent discriminated against them within the meaning of Civil Code section 51 and section 12948 of the

FEHA.

B. Affirmative Defenses

1. FEHA Defenses

The Act explicitly permits postsecondary educational institutions to reserve housing for "married students." (Gov. Code, §12995, subd. (b).) Beyond this permission, however, the FEHA states no affirmative defense of any kind for violations of the prohibitions of section 12955 or section 12948.

2. Unruh Act Defense

Discriminatory conduct under the Unruh Act -- and thus discrimination under section 12948 and section 12955, subdivision (d) of the FEHA -- may be justified by a showing that the conduct is reasonable and not arbitrary, and is thus lawful under the Unruh Act. (Marina Point, Ltd. v. Wolfson, supra, (1982) 30 Cal.3d at pp. 736-37; In re Cox, supra, (1970) 3 Cal.3d at p. 217; DFEH v. Merribrook Apartments, supra, 1988-89 CEB 7, at p. 14.) Respondent has not established a defense of this kind here.

Respondent has adopted a policy against renting her units to unmarried couples as a class. Respondents' blanket exclusion of all unmarried couples is unreasonable and arbitrary. There was no evidence presented to establish, nor did respondent believe, that unmarried couples are more irresponsible, disruptive or disorderly than other tenants or that they are greater credit risks. Respondent's moral objections to renting her units to unmarried couples are not based on a reasonable expectation that the immoral conduct about which she is concerned will cause damage to her property or present

a nuisance which respondent would be entitled to abate. In fact, respondent asserts no such nexus. We therefore determine that respondent has failed to establish an affirmative defense under the Unruh Act and sections 12948 and 12955, subdivision (d) of the FEHA.

3. Religious Freedom Exemption

Respondent does, however, contend that her moral concerns about complainants' unmarried cohabitation, rooted in her sincere religious beliefs, compel us to create a constitutional defense exempting her conduct from the provisions of both section 12948 and section 12955 of the FEHA. She asserts that the Commission, by enforcing these provisions to prohibit her from excluding unmarried couples from her rental property, would impair the free exercise of her religion in violation of the U.S. and California Constitutions. To avoid this unconstitutionality, respondent argues, the Commission must refuse to enforce the FEHA against her and thus effectively exempt her from its provisions.

We must decline, reluctantly, to decide this issue here. We do not doubt the depth and sincerity of respondent's religious convictions, and we are sensitive to the burden that respondent will bear for adherence to those convictions if the FEH Act is enforced against her. We are also sensitive to complainants' constitutional rights to privacy, and to the need for a liberal interpretation and for uniform and effective enforcement of the Act's prohibition of marital status discrimination in housing.

We lack the authority, however, to weigh these competing interests and determine whether the exemption respondent seeks should be granted here. The California Constitution precludes us from declaring the FEH Act

unconstitutional or refusing to enforce it on that ground unless an appellate court has fount it unconstitutional. (Cal. Const., art. III, §3.5; DFEH v. San Jose (1984) FEHC Dec. No. 84-18, at pp. 7-8 [1984-85 CEB 6].) Since no appellate court has ruled on the issue respondent raises, we may not reach it here and must instead defer the issue to the consideration of the courts.

Thus, no affirmative defense is available to excuse or justify respondent's actions here, and we therefore determine that her discriminatory conduct under section 12948 and section 12955, subdivisions (a) and (d) was unlawful and in violation of the FEHA.

Remedies

A. Actual Damages

The Commission is authorized to award actual damages, including out-of-pocket losses and compensatory damages for emotional injury, if a respondent is found to have violated the Unruh Act and the FEHA provisions relating to marital status discrimination. (Gov. Code, §12970, subd. (a) and §12987, subd. (2); Hess v. Fair Employment and Housing Com., supra, 138 Cal.App.3d at p. 237; DFEH v. Merribrook Apartments, supra, 1988-89 CEB 7, at p. 22; DFEH v. Davis Realty Co., supra, 1986-87 CEB 5 at p. 22; DFEH v. Carefree Ranch Mobile Home Park (1984) FEHC Dec. No. 84-31, at p. 19 [1984-85 CEB 12].)[3]

---

[3] The Department does not seek payment of punitive damages or of the difference in rent between the house denied to complainants and the one they later rented, so no determination meed be made whether such relief would be appropriate.

1. Out-of-Pocket Losses

After respondent refused to rent her unit to complainants, they inspected at least 30 other dwellings before renting a house in Paradise, California. They both spent an average of approximately 30 minutes looking at each of the houses for a combined total of approximately 30 hours. This was time away from work for which each would have been compensated at the rate of approximately $14 per hour. They used the company pickup truck to travel to the various dwellings and traveled an average of one and one-half miles to each at a cost of approximately 21¢ per mile. For the total of approximately 45 miles traveled, the travel cost would amount to $9.45. They obtained a list of available rentals at a cost of $25. Thus, the total cost of obtaining a comparable residence was approximately $454. These expenses are compensable as out-of-pocket losses. (DFEH v. Davis Realty Co., supra, 1986-87 CEB 5 at p. 23; DFEH v. Carefree Ranch Mobile Home Park supra, 1984-85 CEB 12 at p. 19.)

Complainants will also be owed annually compounded interest at the rate of ten percent per year on these amounts, accruing from the time of loss until the date of payment. (DFEH v. Davis Realty Co., supra, at p. 23; Code Civ. Proc., §685.010.)[4]

---

[4] These costs were incurred in the spring of 1987. There is also some evidence indicating that complainants incurred similar costs when they resumed their search for housing in the fall of that year. The Department has not established these additional losses precisely enough to support a damage award, however, and does not appear to seek such an award in any event.

2. Compensatory Damages

The Department also seeks an award of compensatory damages for the emotional injury complainants suffered as a result of respondent's discrimination. Complainants were interested in renting respondent's unit, and they were upset, hurt and angry about respondent's refusal to rent to them. The rejection also revived for complainant Randall the pain of her parents' disapproval of her living with complainant Phillips. And complainants found the house they eventually rented less convenient and its location less congenial than respondent's unit would have been.

While the is thus some evidence of emotional injury under the standards of DFEH v. Aluminum Precision Products, Inc., (1988) FEHC Dec. No. 88-05 at pp. 10-13 [1988-89 CEB 4], we do not find that injury to have been very severe or persistent, and we therefore award $300 to complainant Randall and $200 to complainant Phillips for the injuries they have suffered. Interest will be due on these amounts at the rate of ten percent per year, compounded annually, from the effective date of this decision until payment. (DFEH v. Davis Realty Co., supra, 1986-87 CEB 5 at p. 26; Code Civ. Proc., §685.010.)

B. Affirmative Relief

The Act authorizes the Commission to order affirmative relief, including an order to cease and desist from any unlawful practice and an order to take whatever other actions are necessary, in the Commission's judgment, to effectuate the purpose of the Act. (Gov. Code, §12970, subd. (a) and §12987, subd. (3).) Pursuant to this authority, we will order respondent to post and distribute the standard notices informing potential tenants of the outcome of this case and of their rights and

remedies under the FEHA. (DFEH v. Davis Realty Co., supra, 1986-87 CEB 5 at p. 27; DFEH v. Merribrook Apartments, supra, 1988-89 CEB 7, at p. 23.)

Respondent argues that the order for these notices is itself an unconstitutional infringement on her free exercise rights because the order compels her to make statements against her belief. While we are sensitive to respondent's concern, we have no more authority to decide this constitutional issue than we do to grant the general exemption respondent seeks, and we therefore adhere to our usual remedial practice.

ORDER

1.The accusation in Case No. FHL87-88 E5-0058, insofar as it alleges violations of Government Code section 12955, subdivisions (a) through (d) with regard to complainant Gail Randall, is dismissed.

2. Respondent Evelyn Smith shall cease and desist from discriminating in her housing accommodations on the basis of marital status.

3. Within 60 days of the effective date of this decision, respondent Evelyn Smith shall pay one-half each to the complainants, plus annually compounded interest of ten percent (10%) per annum from the date the expenses were incurred (June 1, 1987) to the date paid.

4. Within 10 days of the effective date of this decision, respondent shall:

a. Sign copies of the notices attached to this decision;

b. Post copies of these notices and the Department's Fair Housing Poster (No. DFEH 164) at any location where she transacts with applicants the rental of any housing accommodation she owns or manages in California. Copies of the notice in Attachment A shall remain posted for 90 days after the effective date of this decision, and copies of the notice in Attachment B and of the Department poster shall remain posted permanently. The notices shall not be reduced in size, and reasonable steps shall be taken to ensure that they are not defaced, altered, or covered by any material;

c. Give copies of these notices to each person who expresses interest in applying to rent any housing accommodation owned or managed by respondent in California. These notices shall be distributed in this manner for the same periods for which they are required to be posted, above.

5. Within 60 days of the effective date of this decision, respondent shall pay to complainant Gail Randall $300 and to complainant Kenneth Phillips $200 as damages in compensation for emotional injury, together with interest on those amounts at the rate of ten percent per year, compounded annually, from the effective date of this decision until payment.

6. Within 70 days of the effective date of this decision, respondent shall report to the Commission and the Department in writing, describing the steps she has taken to comply with paragraphs 2-5 of this order.

7. Complainant Phillips shall in writing waive any rights or claims he may have under Civil Code section 52 based on the events described in this decision. The Department shall serve copies of the waiver on respondent and the Commission.

Any party adversely affected by this decision may seek judicial review of the decision under Government Code section 1094.5. Any petition for judicial review and related papers should be served on the Department, the Commission, respondents and complainants.

Dated: August 10, 1989

FAIR EMPLOYMENT AND HOUSING COMMISSION

OSIAS G. GOREN

CRUZ F. SANDOVAL

GEORGIA MEGUE

MILAN D. SMITH, JR.

PAUL T. BANNAI

ATTACHMENT A

NOTICE
to
APPLICANTS FOR RENTAL HOUSING
offered by
EVELYN SMITH

After a full hearing, the California Fair Employment and Housing Commission has found that Evelyn Smith, the owner of rental property at 675-685 Eastwood Avenue, Chico, California, violated the California Fair Employment and Housing Act by refusing to rent to two applicants because they were an unmarried couple. (DFEH v. Evelyn Smith (1989) FEHC Dec. No. 89-11.)

As a result of this finding, the Commission has ordered posting and distribution of this Notice and:

1) Payment to those applicants of money damages for their out-of-pocket losses and for their emotional injury; and

2) Posting and distribution of official notices and posters concerning rental applicants' rights and remedies under the California Fair Employment and Housing Act.

Dated : _____ By:_____
Evelyn Smith

THIS NOTICE IS REQUIRED TO BE POSTED UNDER PENALTY OF LAW BY THE CALIFORNIA FAIR EMPLOYMENT AND HOUSING COMMISSION. IT SHALL REMAIN POSTED FOR 90 DAYS IN THIS LOCATION AND SHALL NOT BE ALTERED, REDUCED, OBSCURED, OR OTHERWISE TAMPERED WITH IN ANY WAY THAT HINDERS ITS VISIBILITY.

ATTACHMENT B

NOTICE
to
APPLICANTS FOR RENTAL HOUSING
offered by
EVELYN SMITH

Evelyn Smith practices Equal Housing Opportunity.

The California Fair Employment and Housing Act provides that you have the right to discrimination-free housing. When applying for rental housing, it is illegal for an owner or the owner's manager or agent to do any of the following:

1) Deny you housing or tell you housing is unavailable because of your race, color, sex, marital status, ancestry, religion, or national origin, or any other basis made unlawful under the Unruh Civil Rights Act;

2) Ask you (either orally or in writing) about your race, color, sex, marital status, ancestry, religion, or national origin, or any other basis made unlawful under the Unruh Civil Rights Act;

3) Make any statement, whether oral or written, indicating that she or he prefers to rent to or wants to limit the available housing to any particular race, color, sex, marital status, ancestry, religion, national origin, or to limit tenants on any other basis made unlawful under the Unruh Civil Rights Act.

Discrimination because of marital status includes taking any of the actions described above against an unmarried couple.

If you feel that any of these illegal practices have happened to you or you have been retaliated against because you opposed these practices, you have sixty days to file a complaint (or one year under the FEHA's coverage of the Unruh Civil Rights Act) with the state Department of Fair Employment and Housing at:

Department of Fair Employment and Housing
1201 I Street - Suite 214
Sacramento, CA 95814
(916) 445-9918

The Department will investigate your complaint. If the complaint has merit, the Department will attempt to resolve it. If no resolution is possible, the Department will prosecute the case with its own attorney before the Fair Employment and Housing Commission. The Commission may order the unlawful activity to stop, and can require the property owner to pay money damages and give other appropriate relief.

You may also elect, after first filing a complaint with the Department, to retain a private attorney and take your case to court.

Dated:_____ By:_____
Evelyn Smith

THIS NOTICE IS REQUIRED TO BE POSTED UNDER PENALTY OF LAW BY THE CALIFORNIA FAIR EMPLOYMENT AND HOUSING COMMISSION. IT SHALL REMAIN POSTED FOR 90 DAYS IN THIS LOCATION AND SHALL NOT BE ALTERED, REDUCED, OBSCURED, OR OTHERWISE TAMPERED WITH IN ANY WAY THAT HINDERS ITS VISIBILITY.

STATUTORY PROVISIONS

United States Constitution, Amendment I:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Religious Freedom Restoration Act, 42 U.S.C. §2000bb:

(a) In General. -- Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).

(b) Exception. -- Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person --

> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the least restrictive means of furthering that compelling governmental interest.

(c) Judicial Relief. -- A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under Article III of the Constitution.

California Government Code section 12955, subdivision (a):

It shall be unlawful:

(a) For the owner of any housing accommodation to discriminate against any person because of the race, color, religion, sex, marital status, national origin, ancestry, familial status, or disability of that person.

California Government Code section 12955, subdivision (d):

It shall be unlawful: [¶] . . . [¶] (d) For any person subject to the provisions of Section 51 of the Civil Code, as that section applies to housing accommodations, to discriminate against any person on the basis of sex, color, race, religion, ancestry, national origin, familial status, marital status, disability, or on any other basis prohibited by that section.

At the time of these events the Unruh Act, Civil Code section 51 read as follows:

This section shall be known, and may be cited, as the Unruh Civil Rights Act. All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, or national origin are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever. This section shall not be construed to confer any right or privilege on a person which is conditioned or limited by law or which is applicable alike to persons of every sex, color, race, religion, ancestry, or national origin. (Stats. 1974, ch. 1193, section 1, p. 2568.)

California Government Code section 12948:

It shall be an unlawful practice under this part for a person to deny or to aid, incite, or conspire in the denial of the rights created by Section 51 or 51.7 of the Civil Code.

California Government Code section 12995:

Nothing contained in this part relating to discrimination in housing shall be construed to: [¶] ... [¶] (2) Prohibit any postsecondary educational institution, whether private or public, from providing housing accommodations reserved for either male or female students so long as no individual person is denied equal access to housing accommodations, or from providing separate housing accommodations reserved primarily for married students or for students with minor dependents who reside with them. [¶] (3) Prohibit selection based upon factors other than race, color, religion, sex, marital status, national origin, or ancestry.

Supreme Court, U.S.
FILED
AUG 6 1996
CLERK

(2)

No. 96-31

In The

Supreme Court of the United States

October Term, 1995

EVELYN SMITH,

Petitioner,

v.

FAIR EMPLOYMENT AND HOUSING COMMISSION, KENNETH PHILLIPS, AND GAIL RANDALL,

Respondents.

On Petition For Writ Of Certiorari
To The Supreme Court Of California

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI BY RESPONDENT FAIR EMPLOYMENT AND HOUSING COMMISSION

JAY-ALLEN EISEN,
California State Bar #042788
* MARIAN M. JOHNSTON,
California State Bar #061643
EISEN & JOHNSTON
LAW CORPORATION
P.O. Box 111
Sacramento, CA 95812-0111
(916) 444-6171

* Counsel of Record
for Respondent
Fair Employment and
Housing Commission

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

39 pp

QUESTIONS PRESENTED

1. Did the California Supreme Court correctly conclude that California's law, which forbids marital status discrimination in housing operated as a business and for a profit, does not violate the Free Exercise Clause of the First Amendment to the United States Constitution?

2. Did the California Supreme Court correctly conclude that California's law, which forbids marital status discrimination in housing operated as a business and for a profit, does not violate the Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb *et seq.*?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI BY RESPONDENT FAIR EMPLOYMENT AND HOUSING COMMISSION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS ... 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 4

REASONS TO DENY PETITION FOR WRIT OF CERTIORARI 6

I

THE ISSUES IN THIS CASE ARE IDENTICAL TO THOSE IN *SWANNER*, AND REVIEW BY THIS COURT IS EQUALLY UNWARRANTED HERE 7

II

THE CALIFORNIA SUPREME COURT CORRECTLY DETERMINED THAT STATE LAWS PROHIBITING DISCRIMINATION DO NOT VIOLATE FEDERAL CONSTITUTIONAL OR STATUTORY RIGHTS OF FREE EXERCISE 9

A. No First Amendment free exercise rights are implicated, as California is merely applying a neutral law of general applicability to prohibit discrimination 9

B. Applying well-established case law, the California Supreme Court properly determined that no 'substantial burden' exists, and this disposes of petitioner's claim under RFRA 12

TABLE OF CONTENTS – Continued

Page

C. The decision below does not create an impossible standard for deciding whether a 'substantial burden' exists 16

D. The decision by the California Supreme Court does not conflict with any other state court decisions 18

E. No confusion exists among federal appeals courts, but even if it did, this is no reason to grant review here 20

III

CALIFORNIA'S PROHIBITION OF DISCRIMINATION SERVES COMPELLING AND IMPORTANT STATE INTERESTS BY THE LEAST RESTRICTIVE MEANS ... 21

A. California's ban on marital status discrimination in housing serves several compelling state interests 22

1. California's constitutional right to privacy includes the right to be free from marital status discrimination in housing 22

2. California also has a compelling interest in protecting tenants' freedom of intimate association 23

3. California has a compelling commitment to eradicating all discrimination by business establishments 24

B. A complete ban of discriminatory practices is the most effective means to eradicate discrimination 27

TABLE OF CONTENTS – Continued

Page

IV

AN EXEMPTION FOR LANDLORDS WITH RELIGIOUS OBJECTIONS TO ANTIDISCRIMINATION LAWS WOULD BE UNCONSTITUTIONAL 28

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES

Alfred L. Snapp & Son v. Puerto Rico, 458 U.S. 592 (1982) 25

Atkisson v. Kern County Housing Authority, 59 Cal.App.3d 89, 130 Cal.Rptr. 375 (1976) 3, 23

Attorney General v. Desilets, 418 Mass. 316, 636 N.E.2d 233 (1994) 5, 19

Barrows v. Jackson, 346 U.S. 249 (1953) 24

Board of Dirs. of Rotary International v. Rotary Club, 481 U.S. 537 (1987) 24, 25

Board of Ed. of Kiryas Joel v. Grumet, ___ U.S. ___, 114 S.Ct. 2481, 129 L.Ed.2d 546 (1994) 29

Bob Jones University v. United States, 461 U.S. 574 (1983) 15, 27, 29

Bob-Lo Excursion Co. v. Michigan, 333 U.S. 28 (1948) 11, 24

Braunfeld v. Brown, 366 U.S. 599 (1961) 12, 15

Burks v. Poppy Construction Co., 57 Cal.2d 463, 20 Cal.Rptr. 609, 350 P.2d 313 (1962) 11

Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520 (1993) 8, 16, 27

City of Santa Barbara v. Adamson, 27 Cal.3d 123, 164 Cal.Rptr. 539, 610 P.2d 436 (1980) 3, 23, 24

Employment Division v. Smith, 494 U.S. 872 (1990) 4

TABLE OF AUTHORITIES – Continued

Page

Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985) 15, 29

Exxon Corp. v. Wisconsin Dep't of Revenue, 447 U.S. 207 (1980) 7

Fox v. City of Los Angeles, 22 Cal.3d 792, 150 Cal.Rptr. 867, 587 P.2d 663 (1978) 28

Gantt v. Sentry Insurance, 1 Cal.4th 1083, 4 Cal.Rptr.2d 874, 824 P.2d 680 (1992) 25

Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964) 11

Hernandez v. Commissioner, 490 U.S. 680 (1989) ... 5, 12, 15

Hicks v. Garner, 69 F.3d 22 (5th Cir. 1995) 20

Hill v. National Collegiate Athletic Association, 7 Cal.4th 1, 26 Cal.Rptr.2d 834, 865 P.2d 633 (1994) ..3, 22

Hishon v. King & Spalding, 467 U.S. 69 (1984) 11

In re Cox, 3 Cal.3d 205, 90 Cal.Rptr. 24, 474 P.2d 992 (1970) 14

Koire v. Metropolitan Car Wash, 40 Cal.3d 24, 219 Cal.Rptr. 133, 707 P.2d 195 (1985) 25

Layne & Bowler Corp. v. Western Well Works, 261 U.S. 387 (1923) 6

Lemon v. Kurtzman, 403 U.S. 602 (1971) 28

Mack v. O'Leary, 80 F.3d 1175 (7th Cir. 1996) 20

Marina Point, Ltd. v. Wolfson, 30 Cal.3d 721, 180 Cal.Rptr. 496, 640 P.2d 115 (1982), *cert. denied*, 459 U.S. 858 25

TABLE OF AUTHORITIES – Continued

Page

New York State Club Association v. NYC, 487 U.S. 1 (1988) 25

O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987) 20

Otten v. Baltimore & Ohio R. Co., 205 F.2d 58 (2d Cir. 1953) 15

Pines v. Tomson, 160 Cal.App.3d 370, 206 Cal.Rptr. 866 (1984) 29

Reitman v. Mulkey, 387 U.S. 369 (1967) 14

Roberts v. United States Jaycees, 468 U.S. 609 (1984) 11, 24, 27

Shelley v. Kraemer, 334 U.S. 1 (1948) 24

Sherbert v. Verner, 374 U.S. 398 (1963) 13

State by Cooper v. French, 460 N.W.2d 2 (Minn. 1990) 4, 19

Swaggart v. Board of Equalization, 493 U.S. 378 (1990) 5, 12, 15

Swanner v. Anchorage Equal Rights Commission, 874 P.2d 274 (Alaska 1994), *cert. denied*, ___ U.S. ___, 115 S.Ct. 460, 130 L.Ed.2d 368 ..... *passim*

Tony & Susan Alamo Foundation v. Secretary of Labor, 471 U.S. 290 (1985) 12

United States v. Lee, 455 U.S. 252 (1982) 5, 15, 30

Walker v. Superior Court, 47 Cal.3d 112, 253 Cal.Rptr. 1, 763 P.2d 852 (1988) 29

Wisconsin v. Yoder, 406 U.S. 205 (1972) 5, 15, 16

TABLE OF AUTHORITIES – Continued

Page

STATUTES AND CONSTITUTIONS

42 United States Code

§ 2000bb 1, 5, 12

§ 2000bb-1 5

§ 2000bb-2 13

§ 2000bb-4 28

California Government Code

§ 12920 ..... 2, 25, 27

§ 12927 26

§ 12955 26

§ 12955.4 26

California Statutes,

1963, ch. 1853, § 2 26

1980, ch. 992, § 4 26

1992, ch. 182, § 3 26

United States Constitution, Amendment I ..... *passim*

California Constitution,

Article I, § 1 ..... 1, 3, 22

Article I, § 4 ..... 1, 28

OTHER

Senate Report No. 103-111, 103d Congress, 1st Session, *reprinted in* 3 U.S.C.C.A.N. 1892 (1993) 13

Respondent Fair Employment and Housing Commission of the State of California (Commission) respectfully files this brief in opposition to the petition for writ of certiorari.

The petition seeks review of *Smith v. Fair Employment & Housing Com.*, 12 Cal.4th 1143, 51 Cal.Rptr.2d 700, 913 P.2d 909 (1996). The California Supreme Court held, as a matter of state law, that California's statutory proscription against marital status discrimination in housing prohibits a landlord from denying housing to an unmarried couple based on their marital status. It further held that the state's ban on marital status discrimination in housing offends neither the Free Exercise Clause of the United States Constitution nor the Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb *et seq* (RFRA).

CONSTITUTIONAL AND STATUTORY PROVISIONS

In addition to, and to correct, the constitutional and statutory provisions cited by petitioner, the Commission submits the following provisions:

"Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person – (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1, subd. (b).

"All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy." Cal. Const. art. I, § 1 (West 1983).

"Free exercise and enjoyment of religion without discrimination or preference are guaranteed. This liberty of conscience does not excuse acts that are licentious or inconsistent with the peace or safety of the State. The Legislature shall make no law respecting an establishment of religion." Cal. Const. art. I, § 4 (West 1983).

"[T]he practice of discrimination because of race, color, religion, sex, marital status, national origin, ancestry, familial

status, or disability in housing accommodations is declared to be against the public policy. . . . [¶] This part shall be deemed an exercise of the police power of the state for the protection of the welfare, health, and peace of the people of this state." Cal. Gov't Code § 12920 (West Supp. 1996).

STATEMENT OF THE CASE

The Commission agrees, in substantial part, with petitioner's statement of the case. Petitioner Evelyn Smith owns housing units that she rents, for profit and for business purposes, to the general public, but she will not rent to unmarried couples and prefers to rent to married couples. Petitioner's Appendix (App.) 196a-198a, ¶¶4, 5, 7-11.

Gail Randall and Kenneth C. Phillips, an unmarried couple, named here as respondents and below as real parties in interest, filed complaints with California's Department of Fair Employment and Housing after petitioner refused to rent one of her units to them because of their marital status. App. 195a, ¶1-2; App. 198a, ¶11. After an administrative hearing, the Commission ruled that petitioner's conduct was unlawful discrimination under state law. App. 209a.

Thereafter, the California Supreme Court affirmed the Commission's ruling that petitioner violated state law, and further held that application of state law to petitioner did not violate her state constitutional rights. *Smith v. FEHC*, 12 Cal.4th at 1160, 1178-1179,[1] App. 18a, 43a-45a. It also rejected petitioner's claims that she was entitled to an exemption from state law under either the Free Exercise Clause of the First Amendment or the Religious Freedom Restoration Act of 1993. *Smith v. FEHC*, 12 Cal.4th at 1161, 1176, App. 19a, 40a-42a.

Several specific statements in petitioner's Statement of the Case, though not of critical importance, are not supported

---

[1] The decision by the California Supreme Court will be referred to as "*Smith v. FEHC*" to distinguish it from this Court's own *Smith* decision.

by petitioner's citations. First of all, nothing indicates petitioner "earns her livelihood" from her housing rental business. Cert. Pet., p. 2. She "owns and rents four rental units. . . . They are operated exclusively for business and commercial purposes, with income generated from the rentals reported as business income. The business is not operated or classified as a religious, charitable or other nonprofit concern." *Smith v. FEHC*, 12 Cal.4th at 1151, App. 3a, 196a, ¶4.

Also, nothing indicates she "began renting the town homes 1-3 years before the California Legislature prohibited marital status discrimination in housing in 1975." Cert. Pet., p. 2. Housing discrimination based on marital status violates California's constitutional right of privacy, as well as state statutes. *Atkisson v. Kern County Housing Authority*, 59 Cal.App.3d 89, 98, 130 Cal.Rptr. 375 (1976). An express constitutional guarantee of the right of privacy was adopted in 1972. Cal. Const. art. I, § 1 (West 1983); *Hill v. National Collegiate Athletic Assn.*, 7 Cal.4th 1, 15, 26 Cal.Rptr. 834, 865 P.2d 633 (1994). California's constitutional right to privacy is protected against private intrusion as well as state action. *Id.* at 17-18. This right includes "the right to live with whomever one wishes or, at least, to live in an alternate family with persons not related by blood, marriage, or adoption." *City of Santa Barbara v. Adamson*, 27 Cal.3d 123, 130, 164 Cal.Rptr. 539, 610 P.2d 436 (1980) (footnote omitted).

Petitioner cites the posting order in the Commission's decision. Cert. Pet., pp. 5-6. This reference is out of date, as the portion of the order to which she refers is no longer in effect. *Smith v. FEHC*, 12 Cal.4th at 1164, n.15, App. 24a, n.15.

Finally, petitioner attempts to diminish the import of the decision of the California Supreme Court by saying there was no majority, only a plurality. Cert. Pet., pp. 9-10. In fact, Justice Mosk, the fourth Justice to rule in favor of the Commission, stated, "I generally concur in the opinion prepared by Justice Werdegar. I largely join in its analysis. I fully join in its disposition. . . . [¶] I write separately to consider the Religious Freedom Restoration Act of 1993. . . . " *Smith v.*

FEHC, 12 Cal.4th at 1179-1180, App. 47a (Mosk, J., concurring).

SUMMARY OF ARGUMENT

This petition presents precisely the same issues that this Court found did not warrant review in *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274 (Alaska 1994), *cert. denied*, ___ U.S. ___, 115 S.Ct. 460, 130 L.Ed.2d 368. There, as here, a landlord would "not rent to those whom he expects will engage in conduct repugnant to his religious beliefs, namely cohabitation outside of marriage." *Id.*, 874 P.2d at 278. The Supreme Court of Alaska, like the Supreme Court of California, determined that this policy violated state law. *Id.* at 276, 278. The Alaskan court also rejected the landlord's federal claims, holding that "enforcing the fair housing laws does not deprive him of his right to free exercise of his religion." *Id.* at 276. The California Supreme Court reached the identical conclusion.

In analyzing the landlords' constitutional free exercise claims, both state supreme courts applied the standard set by this Court in *Employment Division v. Smith*, 494 U.S. 872 (1990), and found there was no constitutional violation. *Swanner*, 874 P.2d at 279, 280; *Smith v. FEHC*, 12 Cal.4th at 1162.

Both state supreme courts also considered whether their state laws violated the federal Religious Freedom Restoration Act of 1993, enacted after this Court's *Smith* decision. Although the California and Alaska Supreme Courts applied different portions of the RFRA test, they arrived at the same conclusion: a state law prohibiting marital status discrimination in housing operated for commercial purposes does not violate RFRA, despite a landlord's religious objections to such proscription. *Swanner*, 874 P.2d at 280, n.9; *Smith v. FEHC*, 12 Cal.4th at 1176.

Contrary to petitioner's representations, the decision by the California Supreme Court conflicts with no other decision by a state supreme court, insofar as these decisions interpret and apply federal law. *State by Cooper v. French*, 460 N.W.2d

2 (Minn. 1990), was based entirely on interpretation of state law, with the Minnesota Supreme Court expressly declining to address federal law. *Id.* at 11. *Attorney General v. Desilets*, 418 Mass. 316, 636 N.E.2d 233 (1994), likewise merely interpreted state law and concluded that summary judgment was not warranted. *Id.* at 241. And, as discussed above, *Swanner* reached the same result as this case.

Petitioner asserts that some federal courts are confused as to the proper test for determining whether a substantial burden exists for purposes of RFRA. Cert. Pet., pp. 23-24. This argument both overstates the extent of any confusion, and, more importantly, fails to diminish the sound reasoning of the California Supreme Court as to this issue. *Smith v. FEHC* rests on a well-established body of pre-*Smith* case law describing what constitutes a substantial burden on free exercise rights. This Court has clearly explained that not every burden, but only a significant, undue burden, is legally cognizable so as to require justification. *See, e.g., Swaggart v. Board of Equalization*, 493 U.S. 378, 392 (1990); *Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989); *Wisconsin v. Yoder*, 406 U.S. 205, 220 (1972).

> [E]very person cannot be shielded from all the burdens incident to exercising every aspect of the right to practice religious beliefs. When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity.

United States v. Lee, 455 U.S. 252, 261 (1982).

In adopting RFRA, Congress did not change the requirement that a substantial burden must exist before free exercise rights are even implicated. To the contrary, RFRA explicitly provides that free exercise must be "substantially burdened" as a prerequisite to any need for further review. *See* 42 U.S.C. §§ 2000bb, subds. (a)(3), (b)(1) and (b)(2), 2000bb-1, subds. (a) and (b). RFRA clearly looks to this Court's decisions holding that a finding of a substantial burden is the first step in determining whether any free exercise rights are infringed.

The only change RFRA made was to restore the pre-*Smith* standard for the second step in the analysis, so that if a substantial burden does exist, the government must then show both a compelling interest and that it is using the least restrictive alternative.

Finally, even if this Court were to agree with petitioner as to the burden being legally significant, review by this Court is still unnecessary. If a substantial burden exists and RFRA applies, California has compelling state interests in eradicating discrimination, protecting privacy rights, and avoiding any establishment of, or preference for, religion. These vital concerns all support the state's denial of petitioner's demand that she be exempted from compliance with state law forbidding housing discrimination based on marital status.

REASONS TO DENY PETITION FOR WRIT OF CERTIORARI

"A petition for a writ of certiorari will be granted only for compelling reasons." Rule 10, Supreme Court Rules. Petitioner fails to satisfy this standard.

While this case involves important issues, petitioner shows nothing requiring this Court's attention. Although the decision by the California Supreme Court has attracted some public attention, it makes no new or special law. It merely applies well-established principles to a particular set of facts.

Furthermore, petitioner's argument that this case conflicts with prior decisions of this Court and with decisions from three other state supreme courts is inaccurate. A careful review of these decisions shows that they are "really in harmony, and not in conflict, and that there [is] no ground for [this Court] allowing the writ of certiorari to add to an already burdened docket." *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 392-393 (1923).

This is not a case which this Court needs to review.

I. THE ISSUES IN THIS CASE ARE IDENTICAL TO THOSE IN *SWANNER*, AND REVIEW BY THIS COURT IS EQUALLY UNWARRANTED HERE

Just two years ago, the Supreme Court of Alaska ruled that federal law did not preclude Alaska's prohibition of marital status discrimination in housing generally available to the public, despite a landlord's religious objections to unmarried couples sharing housing, and this Court denied a petition for writ of certiorari, with only one dissenting voice. *Swanner*, 115 S.Ct. 460, 130 L.Ed.2d 368.

Swanner could scarcely be more similar to this case. There, a landlord "refused to rent or allow inspection of residential properties after learning that each complainant intended to live with a member of the opposite sex to whom he or she was not married." *Id.*, 874 P.2d at 276-277. The landlord "readily admitted having a policy of refusing to rent to any unmarried couple who intend to live together on the property." *Id.* at 277. His "refusal to rent or show property to unmarried couples is based on his Christian religious beliefs. Under Swanner's religious beliefs, even a non-sexual living arrangement by roommates of the opposite sex is immoral and sinful. . . . " *Id.* The landlord claimed "he is excused from compliance with the anti-discrimination laws because of his fundamental right to the free exercise of his religion. . . . " *Id.* These facts are essentially identical to those presented here.

The Alaska Supreme Court ruled that the landlord's conduct violated state and local laws forbidding discrimination in housing based on marital status. *Id.* at 278. The California Supreme Court reached the same conclusion under California's anti-discrimination statutes. *Smith v. FEHC*, 12 Cal.4th at 1160. These portions of the decisions, involving questions of state law, have been finally determined by the highest court of each state, and are not subject to review by this Court. *Exxon Corp. v. Wisconsin Dep't of Revenue*, 447 U.S. 207, 226, n.9 (1980).

As to the landlord's federal constitutional claims, the Alaska Supreme Court ruled that "enforcing the fair housing laws does not deprive him of his right to free exercise of his

religion." *Swanner*, 874 P.2d at 276. Here, again, the California Supreme Court reached the identical conclusion, finding that the "First Amendment does not support Smith's claim." *Smith v. FEHC*, 12 Cal.4th at 1161. *See Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 531 (1993), citing *Smith*, 494 U.S. 872.

In each case, this analysis defeated the landlord's First Amendment claim. The Alaska Supreme Court held that free exercise rights were not unconstitutionally burdened by a prohibition on marital status discrimination in housing because "any burden placed on Swanner's religion by the state and municipal interest in eliminating discrimination in housing falls on his conduct and not his beliefs. Here, the burden on his conduct affects his commercial activities." *Swanner*, 874 P.2d at 283. The California Supreme Court similarly applied the analysis in *Smith* and concluded that California law, which merely prohibits conduct, not belief, "does not violate the free exercise clause. . . . " *Smith v. FEHC*, 12 Cal.4th at 1162. " 'We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate.' " *Id.* at 1164, quoting *Smith*, 494 U.S. at 878-879.

Both state supreme courts further held that state law barring housing discrimination based on marital status did not violate the Religious Freedom Restoration Act of 1993, even though the discrimination was motivated by religious beliefs. RFRA was enacted while the case was pending before the Alaska Supreme Court, but the court determined that RFRA made no difference.

> Assuming that the Act is constitutional and applies to this case, it does not affect the outcome, because . . . compelling state interests support the prohibitions on marital status discrimination. The most effective tool the state has for combatting discrimination is to prohibit discrimination; these laws do exactly that. Consequently, the means are narrowly tailored and there is no less restrictive alternative.

Swanner, 874 P.2d at 280, n.9.

As noted above, the California Supreme Court looked to a different provision of RFRA to determine that RFRA did not preclude application of state law. Unlike the Alaska Supreme Court, the California Supreme Court did not assume that the prerequisite for application of RFRA – that is, a substantial burden – existed. Instead, it questioned whether petitioner had met RFRA's threshold requirement and shown that the state law proscribing housing discrimination substantially burdened her free exercise rights. *Smith v. FEHC*, 12 Cal.4th at 1168. It found that "[t]his set of facts does not, under the relevant case law, support Smith's argument that requiring her to comply with FEHA's antidiscrimination provisions substantially burdens her religious exercise." *Id.* at 1176.

So, looking to different provisions of RFRA, the two state supreme courts reached identical conclusions. Both found that a landlord could not assert RFRA as a defense to violation of state laws forbidding housing discrimination based on marital status.

This Court denied a petition for writ of certiorari as to *Swanner*, and no significant changes in the law have occurred since the Court made this decision. Review of this case is equally unwarranted.

II. THE CALIFORNIA SUPREME COURT CORRECTLY DETERMINED THAT STATE LAWS PROHIBITING DISCRIMINATION DO NOT VIOLATE FEDERAL CONSTITUTIONAL OR STATUTORY RIGHTS OF FREE EXERCISE

A. No First Amendment free exercise rights are implicated, as California is merely applying a neutral law of general applicability to prohibit discrimination.

Petitioner's request for review fails to distinguish between her claim under the Free Exercise Clause and her claim under RFRA. Her implicit suggestion that the same standards apply to both claims ignores the lesson of *Smith*.

In *Smith*, this Court distinguished between the constitutional right to believe and profess whatever religious doctrine

one chooses, and the right to engage in specific conduct. *Id.*, 494 U.S. at 877-878. As to the latter, it said, "[w]e have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate." *Id.* at 878-879.

Petitioner weakly proffers two reasons why *Smith* does not totally destroy any claim that her constitutional rights are being violated by the application of state law. First, she says that the California law is not a statute of general applicability because some university housing is exempted from coverage under state law. Cert. Pet., p. 28. However, the California Supreme Court's interpretation of state law belies this contention.

> The statutory prohibition against discrimination because of marital status (Gov. Code, § 12955) is a law both generally applicable and neutral towards religion. The law is generally applicable in that it prohibits all discrimination without reference to motivation. The law is neutral in that its object is to prohibit discrimination irrespective of reason – not because it is undertaken for religious reasons.

Smith v. FEHC, 12 Cal.4th at 1161-1162. This interpretation of state law by the highest court in the state must be accepted. *Exxon Corp.*, 447 U.S. at 226, n.9.

Petitioner also asserts that this case is entitled to strict scrutiny under the compelling interest standard based on an exception outlined in *Smith* for so-called "hybrid" claims, where a free exercise claim is asserted "in conjunction with other constitutional protections. . . . " *Smith*, 494 U.S. at 881. She relies, in part, on the posting order issued by the Commission. Cert. Pet., pp. 28-29. However, the Commission agreed to eliminate the portions of the posting order to which she objected. *Smith v. FEHC*, 12 Cal.4th at 1164, n.15. This is no longer an issue.

Petitioner also argues that the compelling interest test is required due to a "taking" of her property rights, in that she can no longer exclude persons to whom she objects and can not exercise her rights as a property owner. Cert. Pet., p. 29. This Court need not concern itself with this argument. The

feebleness of any claim that a state law prohibiting discrimination by places of public accommodation amounts to a violation of substantive due process has been apparent to the Court since one of its first decisions under the modern civil rights statutes.

> Thirty-two States now have it on their books either by statute or executive order and many cities provide such regulation. Some of these Acts go back four-score years. It has been repeatedly held by this Court that such laws do not violate the Due Process Clause of the Fourteenth Amendment. Perhaps the first such holding was in the Civil Rights Cases themselves. . . . [t]he constitutionality of such state statutes stands unquestioned.

Heart of Atlanta Motel v. United States, 379 U.S. 241, 259-260 (1964) (footnote omitted). *See also Bob-Lo Excursion Co. v. Michigan*, 333 U.S. 28, 34, n.12 (1948); *Roberts v. United States Jaycees*, 468 U.S. 609, 624 (1984).

California has long prohibited discrimination in places of public accommodation, including housing, rejecting any contention that this prohibition violates due process and recognizing that "[u]nder the police power reasonable restrictions may be placed upon the conduct of any business and the use of any property . . . , and the restriction here imposed in furtherance of the policy against discrimination is reasonable." *Burks v. Poppy Construction Co.*, 57 Cal.2d 463, 471, 20 Cal.Rptr. 609, 350 P.2d 313 (1962).

Petitioner has presented nothing to warrant re-examination of this well-settled issue. "Invidious private discrimination . . . has never been accorded affirmative constitutional protections." *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984) (quoting *Norwood v. Harrison*, 413 U.S. 455, 470 (1973)).

In any event, separate attention to petitioner's contention that this is a "hybrid" case is not required. As the California Supreme Court recognized, the "hybrid" issue need not be considered since "the effect is simply to require us to apply the same test we must apply in any event under the Religious Freedom Restoration Act. . . . " *Smith v. FEHC*, 12 Cal.4th at

1165. As discussed below, no RFRA violation exists, so even if this were a "hybrid" case, there is no constitutional violation.

B. Applying well-established case law, the California Supreme Court properly determined that no 'substantial burden' exists, and this disposes of petitioner's claim under RFRA.

RFRA, like pre-*Smith* Free Exercise Clause analysis, requires a plaintiff to show that governmental action imposes a *substantial* burden on free exercise of religion before the government is required to justify its action. "[G]overnments should not *substantially* burden religious exercise without compelling justification." 42 U.S.C. § 2000bb, subd. (a)(3) (emphasis added). The purpose of RFRA was (1) to make the compelling interest test applicable "in all cases where free exercise of religion is *substantially* burdened; and (2) to provide a claim or defense to persons whose religious exercise is *substantially* burdened by government." 42 U.S.C. § 2000bb, subd. (b) (emphasis added).

The California Supreme Court recognized that RFRA reaffirms the many prior decisions by this Court requiring a substantial burden before free exercise rights are implicated.

> Under RFRA, unless the challenged law imposes a *substantial burden*, the government need not demonstrate a compelling interest justifying the law or show that the law is the least restrictive means to further the interest.

Smith v. FEHC, 12 Cal.4th at 1168 (court's emphasis).

This accurately describes pre-*Smith* decisions. "The free exercise inquiry asks whether government has placed a *substantial* burden on the observation of a central religious belief or practice. . . . " *Hernandez*, 490 U.S. at 699 (emphasis added). *See also Swaggart*, 493 U.S. at 384-392; *Tony & Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290, 303-305 (1985); *Braunfeld v. Brown*, 366 U.S. 599, 605-606 (1961).

The California Supreme Court was also correct in recognizing that RFRA did not change this portion of free exercise analysis. As explained in RFRA's legislative history:

> Pre-*Smith* case law makes it clear that only governmental actions that place a substantial burden on the exercise of religion must meet the compelling interest test set forth in the act. The act thus would not require such a justification for every government action that may have some incidental effect on religious institutions.

S. Rep. No. 103-111, 103d Cong., 1st Sess., *reprinted in* 3 U.S.C.C.A.N. 1892, 1898 (1993) (footnotes omitted).

Petitioner does not actively dispute that she must establish a substantial burden; she merely contends that the California Supreme Court employed an "extreme definition of 'substantial burden,' " that "grossly conflicts with decisions of this Court." Cert. Pet., pp. 11, 15. She laments that "the California Supreme Court has pushed out of reach for most people the protections of the Religious Freedom Restoration Act and the Free Exercise Clause." Cert. Pet., p. 11.

Although petitioner complains about the decision below, the real focus of her complaint is the very nature of free exercise rights themselves. Not every infringement, no matter how trivial or legally insignificant, warrants protection, and the California Supreme Court carefully considered what situations have been found to impose a substantial burden on free exercise rights. As it recognized, Congress, in enacting RFRA, did not define a "substantial burden."[2] *Smith v. FEHC*, 12 Cal.4th at 1169.

So, the California Supreme Court painstakingly reviewed this Court's pre-*Smith* decisions to determine what facts constitute a substantial burden. It first considered the unemployment insurance cases, such as *Sherbert v. Verner*, 374 U.S. 398 (1963).

> This case . . . differs from the unemployment compensation cases. . . . [T]he degree of compulsion

---

[2] RFRA does define other terms. *See* 42 U.S.C. § 2000bb-2.

> involved is markedly greater in the unemployment compensation cases than in the case before us. In the former instance, one can avoid the conflict between the law and one's beliefs about the Sabbath only by quitting work and foregoing compensation. To do so, however, is not a realistic solution for someone who lives on the wages earned through personal labor. In contrast, one who earns a living through the return on capital invested in rental property can . . . avoid the conflict, without threatening her livelihood, by selling her units and redeploying the capital in other investments.

Smith v. FEHC, 12 Cal.4th at 1170.

Another difference from unemployment compensation cases is that here, "Smith is involved in a commercial enterprise," and petitioner is seeking an exemption that would change "the course of her business." *Id.*[3] Petitioner colorfully characterizes California's anti-discrimination laws as having a "crushing impact," Cert. Pet., p. 12, but the state is merely regulating and placing an economic burden on her business activities insofar as they affect the public.

Furthermore, an economic consequence on the operation of a business has never been held to constitute a substantial burden for purposes of free exercise analysis. "[I]t cannot be expected, much less required, that legislators enact no law regulating conduct that may in some way result in an economic disadvantage to some religious sects and not to others because of the special practices of the various religions."

---

[3] Petitioner argues that the effect on victims of discrimination relates to the question of compelling state interest. Cert. Pet., p. 27. While this is true, petitioner fails to recognize that unlike an individual seeking unemployment benefits, she is seeking the freedom to discriminate while she engages in a commercial enterprise and operates a for-profit business that affects other persons. Here, the state is regulating a business affected with a public interest, and prohibiting that commercial enterprise from discriminating. "Urban housing is clearly marked with the public interest." *Reitman v. Mulkey*, 387 U.S. 369, 385 (1967) (Douglas, J., concurring). *See also In re Cox*, 3 Cal.3d 205, 212, 90 Cal.Rptr. 24, 474 P.2d 992 (1970).

Braunfeld, 366 U.S. at 606. *See also Swaggart*, 493 U.S. at 391; *Hernandez*, 490 U.S. at 699.

The California Supreme Court also considered *Yoder*, the other decision by this Court to which Congress specifically referred in adopting RFRA. There, religious beliefs required parents to educate their children at home after the eighth grade, and if a state law forced Amish children to attend high school, "the harm to the Amish way of life is permanent." *Smith v. FEHC*, 12 Cal.4th at 1171. Here, there is no religious belief requiring petitioner to rent apartments, so the burdens are quite different. *Id.*

This Court's prior decision most like this case is *Bob Jones University v. United States*, 461 U.S. 574 (1983). There, as here, a business had religious objections to complying with non-discrimination laws. In that case, a private school was compelled to choose between adhering to its discriminatory beliefs, founded in religious principles, and receiving tax benefits. This Court refused to find that forcing the business to make this choice violated free exercise guarantees. *Id.* at 603-604.

Here, too, application of California law will not prevent petitioner from observing her religious tenets, and will not compel her to engage in conduct she finds sinful. Nothing in either state law or her religious beliefs compels her to rent housing; so there is no inescapable conflict. She had no right to inject her religious beliefs into her business interactions with members of the public. *Lee*, 455 U.S. at 261. "The First Amendment . . . gives no one the right to insist that in pursuit of their own interests others must conform their conduct to his own religious necessities." *Otten v. Baltimore & Ohio R. Co.*, 205 F.2d 58, 61 (2d Cir. 1953) (L. Hand, J.), quoted in *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 710 (1985).

The California Supreme Court acted in full accordance with the prior decisions of this Court in determining that California's anti-discrimination law imposes no legally significant burden on petitioner.

C. The decision below does not create an impossible standard for deciding whether a 'substantial burden' exists.

Petitioner asserts, with no authority, that the California Supreme Court has made free exercise guarantees inaccessible in most cases. Cert. Pet., p. 11. She fails to recognize that, as discussed above, the California Supreme Court merely applied the standards set out by this Court.

Under those well-established standards, a substantial burden does exist in certain situations, and nothing in the decision below suggests that in similar situations, a substantial burden will not continue to be found. The California Supreme Court distinguishes the "line of cases holding that a state may not refuse to pay unemployment compensation to a claimant who quit a job for religious reasons." *Smith v. FEHC*, 12 Cal.4th at 1169-1170. The court never suggests that it would not find that a legally cognizable burden exists in situations similar to those in the unemployment compensation cases.

The California Supreme Court also addresses, and distinguishes, *Yoder*. There, the issue was whether criminal penalties could be imposed on parents who refused to send their children to school after the eighth grade, because they believed that further schooling would destroy their ability to live according to the Amish religion and way of life. "The impact of the compulsory-attendance law on [their] practice of the Amish religion is not only severe, but inescapable. . . . " *Yoder*, 406 U.S. at 218. Again, the California Supreme Court contrasted that situation with petitioner's. *Smith v. FEHC*, 12 Cal.4th at 1171. It certainly did not intimate that this Court should have ruled against the Amish.

Petitioner's suggestion that the California Supreme Court's reasoning would have led to a contrary result in *Church of Lukumi* is equally groundless. Indeed, the majority's only mention of this case is in its discussion of the First Amendment, when it notes that the law in this case, unlike that in *Church of Lukumi*, is not directed at any particular religion. *Smith v. FEHC*, 12 Cal.4th at 1161-1162.

The California Supreme Court correctly recognized that although it would be possible to grant absolute protection to free exercise rights, whether or not there was any substantial burden, this is not the case under RFRA anymore than it is under constitutional analysis. "Congress pointedly retained the threshold requirement in RFRA." *Smith v. FEHC*, 12 Cal.4th at 1169.

> One can imagine an accommodation doctrine, such as that which RFRA embodies, without the threshold requirement of a substantial burden. The resulting law would look something like this: When a person understood his or her religious beliefs as demanding that an activity be conducted in a particular way, and when the state required the activity to be conducted in a different way, the state would in every such instance be obliged to justify its law with a compelling interest and a showing that the law represented the least restrictive means to further the interest. . . . [T]o abandon the threshold requirement of a substantial burden would considerably alter the nature and efficacy of legal duties in our constitutional system: Each person would unilaterally decide, in each of the multitude of situations affected by state regulation, which laws to obey and which to ignore.

Id. at 1168. "The threshold requirement of a 'substantial burden' help[s] . . . avoid this potential for unlimited conflict between the multitude of laws and the multitude of religious beliefs." *Id.* at 1169.

In enacting RFRA, Congress chose to preserve "substantial burden" as a prerequisite to asserting a claim that free exercise rights are infringed. RFRA does not say that *any* burden on the free exercise of religion suffices; only a substantial burden triggers the need to justify government action. To the extent that petitioner believes this requirement is too difficult to meet, she must address her concerns to Congress, not this Court.

D. The decision by the California Supreme Court does not conflict with any other state court decisions.

Petitioner attempts to create a conflict where none exists, in order to convince the Court that this case merits its attention. She asserts that the decision below by the California Supreme Court conflicts with decisions from three other state supreme courts, Cert. Pet., pp. 20-23, but she is wrong.

The Supreme Court of Alaska, in *Swanner*, reached the identical result as the California Supreme Court. As discussed above, both courts concluded that state laws banning marital status discrimination in housing do "not deprive [a landlord] of his right to free exercise of his religion." *Id.*, 874 P.2d at 276. *See also Smith v. FEHC*, 12 Cal.4th at 1161, 1176.

The two courts did follow different paths in analyzing the landlords' RFRA claims, but they reached the same conclusion. *Swanner* found that RFRA was not violated because a compelling state interest existed. *Id.*, 874 P.2d at 280, n.9. This is certainly not in conflict with *Smith v. FEHC*, as the California Supreme Court never reached this issue. *Id.*, 12 Cal.4th at 1176, n.21.

Swanner, on the other hand, did not even consider whether this threshold requirement for a RFRA violation was satisfied. "Assuming that the Act is constitutional and applies to this case, it does not affect the outcome, because we hold in the next section that compelling state interests support the prohibitions on marital status discrimination," said the Alaska Supreme Court. *Id.*, 874 P.2d at 280, n.9. The court's assumption that RFRA was applicable is the *only* notable difference between *Swanner* and this case.

A review of the next section of *Swanner* shows that the Alaska Supreme Court skipped past the threshold analysis for a RFRA violation because Alaska's own constitutional protection for free exercise of religion, unlike the federal statutory guarantee, does *not* require any showing of a substantial burden. Under the Alaska Constitution, "to invoke a religious exemption, three requirements must be met: (1) a religion is involved, (2) the conduct in question is religiously based, and

(3) the claimant is sincere in his/her religious belief." *Swanner*, 874 P.2d at 281.

Because no substantial burden need be shown to establish a violation of the Alaska Constitution, the Alaska Supreme Court proceeded directly to the compelling interest test, which is also the second portion of the RFRA test. It never decided whether or not a substantial burden existed because it was not required to do so under state law, which provided greater protection for freedom of religion than did federal law.

In *Desilets*, the Supreme Judicial Court of Massachusetts found that state law did bar marital status discrimination by a landlord, and then reversed a summary judgment in favor of the landlord. It concluded that "neither party was entitled to summary judgment and that the summary judgment for the defendants should be vacated." *Id.*, 636 N.E.2d at 235.

As in *Swanner*, the focus of the court was the state constitution. "By applying the balancing test as we do, we extend protections to the defendants that are at least as great as those of the First Amendment. No further discussion of rights under the First Amendment is, therefore, necessary." *Desilets*, 636 N.E.2d at 236. In pure *dicta*, the court opined that its state constitutional standard "appears to be the same as that prescribed by the Religious Freedom Restoration Act of 1993. . . . " *Id.* at 236, n.5. This certainly is insufficient to create any conflict with the instant case.

Finally, petitioner cites a decision by the Supreme Court of Minnesota. There, the court concluded that Minnesota law did not bar discrimination against unmarried couples. The court expressly refused to decide whether the landlord would be entitled to an exemption under federal law. "Since our decision is based entirely on interpretation of state statutes and on the Minnesota Constitution, we need not address respondent's arguments as to the application of the United States Constitution, and we decline to do so." *French*, 460 N.W.2d at 11.

Not one of these cases, as compared to this case, creates any conflict which requires resolution by this Court.

E. No confusion exists among federal appeals courts, but even if it did, this is no reason to grant review here.

Finally, petitioner asks this Court to grant review because, she claims, "eight federal appeals courts have defined four different standards . . . " as to what constitutes a substantial burden. Cert. Pet., p. 23. She cites only two decisions – *Mack v. O'Leary*, 80 F.3d 1175 (7th Cir. 1996), and *Hicks v. Garner*, 69 F.3d 22 (5th Cir. 1995) – however, to support this contention.

Mack and *Hicks* both involve prisoner challenges alleging infringements of their free exercise rights.[4] *Mack* is actually two cases consolidated for appeal. In one, Muslim prisoners complained that they were unable to comply with religious rituals as to dining, abstinence, and prayer, which their religious beliefs required during the period of Ramadan. *Id.*, 80 F.3d at 1177. In the other, prisoners belonging to a religious sect known as the Moors, claimed they were refused permission to have a banquet that was an important rite. *Id.* at 1177-1178. In *Hicks*, a prisoner who was a Rastafarian objected to the prison's grooming requirements, that prohibited his dreadlocks. *Id.*, 69 F.3d at 24.

Mack says that circuits have given different answers to what constitutes a substantial burden under RFRA. *Mack*, 80 F.3d at 1178. It recognizes, however, that these alleged differences "may come to nothing in practice." *Id.* "[N]or is it clear that any of the holdings (as distinct from many of the dicta) are inconsistent." *Id.*

In *Hicks*, all that the Fifth Circuit decides is that the prisoner's claim under RFRA cannot be dismissed at the pleading stage as frivolous. *Id.*, 69 F.3d at 23. It notes that

---

[4] Similar claims merited scant attention before the enactment of RFRA, since "[p]rison regulations alleged to infringe constitutional rights are judged under a 'reasonableness' test less restrictive than that ordinarily applied to alleged infringement of fundamental constitutional rights." *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 349 (1987) (rejecting challenge to rule prohibiting Muslim inmates from attending weekly services).

pre-RFRA, a prisoner's free exercise claims were analyzed under a less stringent "reasonable opportunity" test, but that after RFRA was enacted, such claims must be analyzed under the "substantial burden" test. *Id.* at 26. The appeals court does not elaborate on what that test involves, or whether it is satisfied in that case; it merely vacates dismissal and remands the case for further analysis. *Id.*

The Fifth Circuit does remark that RFRA is a new law, and said, in pure dicta, that its "standards have yet to be defined." *Id.* And it includes a footnote describing various post-RFRA decisions. *Id.* at 26, n.22. However, it fails to recognize that RFRA did not alter pre-*Smith* case law insofar as these cases already addressed what constitutes a substantial burden on the free exercise of religion.

Should this Court be presented with a decision where either state courts or lower federal courts, in evaluating RFRA claims, have improperly applied the pre-*Smith* test for a substantial burden, review might well be warranted. But this possibility provides no basis to grant review here, since the California Supreme Court carefully and correctly applied well-established case law to determine that no substantial burden exists in this case.

III. CALIFORNIA'S PROHIBITION OF DISCRIMINATION SERVES COMPELLING AND IMPORTANT STATE INTERESTS BY THE LEAST RESTRICTIVE MEANS

Because the California Supreme Court found that petitioner's free exercise rights were not substantially burdened, it did not decide whether California law prohibiting marital status discrimination in housing furthers compelling state interests by the least restrictive means available. *Smith v. FEHC*, 12 Cal.4th at 1176. If this Court agrees that petitioner's free exercise rights are not burdened to a legally significant extent by a law prohibiting discrimination in a commercial enterprise, this Court also need proceed no further.

Assuming, however, that this Court should conclude that requiring a business owner to comply with antidiscrimination

laws does constitute an undue burden, it should still deny review. It is apparent that California has a compelling interest in prohibiting marital status discrimination in housing, and that a law of general applicability, with no exceptions for any discriminatory religious beliefs a landlord may espouse, is the only effective means to eradicate such discrimination.

A. California's ban on marital status discrimination in housing serves several compelling state interests.

Petitioner attempts to disparage the significance of California's ban on marital status discrimination in housing and other businesses affected with a public interest by referring to totally dissimilar situations, in which the state's interest is either not equally strong or is counterbalanced by competing situations. And, she completely ignores constitutional and statutory provisions evidencing the importance of eliminating marital status discrimination in housing. Even a cursory review of these provisions shows that compelling state interests are unquestionably being served.

1. California's constitutional right to privacy includes the right to be free from marital status discrimination in housing.

A right to privacy is expressly guaranteed in Article I, § 1, of the California Constitution. The specific reference to the inalienable right to privacy was added by a Privacy Initiative adopted by California voters on November 7, 1972. *Hill*, 7 Cal.4th at 15.

This right to privacy under the California Constitution is protected against nongovernmental intrusion as well as state action. "The repeated emphasis in the competing ballot arguments on private party relationships and transactions, as well as individual encounters with government, underscores the efforts of the Privacy Initiative's framers to create enforceable privacy rights against *both* government agencies *and* private entities." *Id.* at 17 (court's emphasis).

California's right to privacy includes "the right to live with whomever one wishes or, at least, to live in an alternate family with persons not related by blood, marriage, or adoption." *Adamson*, 27 Cal.3d at 130 (footnote omitted). There, the California Supreme Court considered a local ordinance restricting persons who could live together as a family to no more than five unrelated persons, as applied to a group of 12 adults who were not related by biological or legal ties, but who were "a close group with social, economic, and psychological commitments to each other" and who wished to live together. *Id.* at 127. Quoting the ballot argument for the Privacy Initiative, the California Supreme Court explained:

> The right of privacy is the right to be left alone. *It is a fundamental and compelling interest.* It protects our *homes*, our *families*, our thoughts, our emotions, our expressions, our personalities, our *freedom of communion*, and our *freedom to associate with the people we choose*. . . .

Id. at 130 (court's emphasis). The Privacy Initiative insures "a right of privacy not only in one's family but also in one's home." *Id.* In *Adamson*, the California Supreme Court cites, with approval, *Atkisson*, with its ban on discrimination against unmarried cohabiting adults and its determination that such a ban is "an invalid infringement of the right of privacy"). *Adamson*, 27 Cal.3d at 129, citing *Atkisson*, 59 Cal.App.3d at 98.

The Legislature's declaration that freedom from marital status discrimination in housing is the public policy of the state and its prohibition of such discrimination under the state's police power, further this fundamental right. This statute banning marital status discrimination in housing generally available to the public evidences the state's commitment to eradicating such discrimination.

2. California also has a compelling interest in protecting tenants' freedom of intimate association.

The federal constitution provides "certain kinds of highly personal relationships a substantial measure of sanctuary from

unjustified interference by the State." *Roberts*, 468 U.S. at 618. "Protecting these relationships from unwarranted state interference therefore safeguards the ability independently to define one's identity that is central to any concept of liberty." *Id.*, 468 U.S. at 619.

"[T]he freedom to enter into and carry on certain intimate or private relationships is a fundamental element of liberty protected by the Bill of Rights." *Bd. of Dirs. of Rotary Int'l v. Rotary Club*, 481 U.S. 537, 545 (1987). Clearly, under the California Constitution, the protection for intimate associations extends to "persons not related by blood, marriage, or adoption." *Adamson*, 27 Cal.3d at 130.

Here, petitioner is asking for state approval, by means of a judicially created exception, of her discrimination against unmarried couples. In doing so, she is involving the state in denying tenants their right to seek housing without discrimination because of their choice of living arrangements. Her request, if granted, would immerse the state in making distinctions between those persons protected from housing discrimination and those who are not, based on whether and how those persons exercise their right of intimate association.

Courts must deny judicial aid to private discrimination, and not assist those who wish to deny others their rights. *Shelley v. Kraemer*, 334 U.S. 1, 17 (1948); *Barrows v. Jackson*, 346 U.S. 249, 254 (1953).

3. California has a compelling commitment to eradicating all discrimination by business establishments.

California's authority to regulate private businesses for the welfare of the general public is indisputable. States have long used their police power to eradicate discrimination and "protect[ ] the civil rights of historically disadvantaged groups. . . . " *Roberts*, 468 U.S. at 624. As Justice Douglas declared long ago in a case upholding a state law prohibiting private discrimination, "the police power of a State under our constitutional system is adequate for the protection of the civil rights of its citizens against discrimination. . . . " *Bob-Lo*

Excursion Co., 333 U.S. at 41 (Douglas, J., concurring, with Black, J.). *See also Alfred L. Snapp & Son v. Puerto Rico*, 458 U.S. 592, 609 (1982) (holding Puerto Rico had standing to sue to prevent discrimination against Puerto Ricans).

California prohibits housing discrimination based on marital status under "the police power of the state for the protection of the welfare, health, and peace of the people of this state." Cal. Gov't Code § 12920 (West Supp. 1996). It has declared that such discrimination violates the state's public policy. *Id.* Discrimination on the prohibited bases is " 'injurious to the public or against the public good.' " *Gantt v. Sentry Insurance*, 1 Cal.4th 1083, 1094, 4 Cal. Rptr. 874, 824 P.2d 680 (1992).

Discrimination by enterprises providing goods and services to the public offends a fundamental policy of this state. *Marina Point, Ltd. v. Wolfson*, 30 Cal.3d 721, 738, 180 Cal.Rptr. 496, 640 P.2d 115 (1982), *cert. denied*, 459 U.S. 858. *See also Koire v. Metro Car Wash*, 40 Cal.3d 24, 36, 219 Cal.Rptr. 133, 707 P.2d 195 (1985).

Constitutional challenges to the enforcement of California law prohibiting discriminatory membership practices by a professional association, based on the First Amendment rights of privacy and association, have been rejected by this Court, recognizing that "public accommodations laws 'plainly serv[e] compelling state interests of the highest order.' " *Bd. of Dirs. of Rotary Int'l*, 481 U.S. at 549; quoting *Roberts*, 468 U.S. at 624. *See also id.*, 468 U.S. at 623 ("Minnesota's compelling interest in eradicating discrimination" justifies any infringement on associational rights.); *New York State Club Ass'n v. NYC*, 487 U.S. 1, 12 (1988) (there is no "constitutional immunity to practice discrimination").

California's commitment to its citizens is that the state will protect them against housing discrimination that the California Legislature has declared to be contrary to public policy. The state legislature has obviously devoted a great deal of thought to this prohibition, and has balanced protection from discrimination and protection for free exercise.

When housing discrimination was first expressly prohibited, the Legislature exempted "any accommodations operated

by a religious, fraternal, or charitable association or corporation not organized or operated for private profit; provided, that such accommodations are being used in furtherance of the primary purpose or purposes for which the association or corporation was formed." Cal. Stats. 1963, ch. 1853, p. 3823, § 2, as amended by Cal. Stats. 1980, ch. 992, pp. 3144-3145, § 4, and Cal. Stats. 1992, ch. 182, p. 6, § 3.

State law now provides: "Nothing in this part shall prohibit a religious organization, association or society, or any nonprofit institution or organization operated, supervised, or controlled by or in conjunction with a religious organization, association, or society, from limiting the sale, rental, or occupancy of dwellings that it owns or operates for other than a commercial purpose to persons of the same religion or from giving preference to those persons, unless membership in that religion is restricted on account of race, color, or national origin." Cal. Gov't Code § 12955.4 (West Supp. 1996). This exemption does not apply to petitioner, since she neither qualifies as a nonprofit organization nor uses the housing to further any religious purposes.

The Legislature also provides an exemption from the nondiscrimination requirements of state law if a landlord merely refuses "to rent or lease a portion of an owner-occupied single-family house to a person as a roomer or boarder living within the household, provided that no more than one roomer or boarder is to live within the household, and the owner complies with subdivision (c) of Section 12955, which prohibits discriminatory notices, statements, and advertisements." Gov't Code § 12927, subd. (c)(2)(A) (West Supp. 1996). This exemption also does not apply to petitioner, who rents four separate units, none of which she herself occupies.

The California Legislature has already balanced the state's interest in eliminating marital status discrimination in housing with other competing interests. The decision by the Legislature that discrimination such as that practiced by petitioner injures the public and must be eliminated for the protection of society should be respected. As this Court explained when it upheld a federal ban on discrimination

against a claim that it interfered with free exercise of religion, "certain governmental interests [are] so compelling as to allow even regulations prohibiting religiously based conduct." *Bob Jones University*, 461 U.S. at 603.

Discrimination in access to public accommodations "both deprives persons of their individual dignity and denies society the benefits of wide participation in political, economic, and cultural life." *Roberts*, 468 U.S. at 625. A state's decision to expand access to public accommodations reflects "the importance, both to the individual and to society, of removing the barriers to economic advancement and political and social integration that have historically plagued certain disadvantaged groups. . . . " *Id.* at 626.

California has determined that eradicating invidious discrimination in housing, including marital status discrimination, is warranted under the state police power for "the protection of the welfare, health, and peace of the people of this state." Cal. Gov't Code § 12920 (West Supp. 1996). This determination should be respected.

B. A complete ban of discriminatory practices is the most effective means to eradicate discrimination.

The "least restrictive means" portion of the RFRA codifies existing law. If the strict scrutiny test applies to a law unduly burdening free exercise, it "must advance ' "interests of the highest order" ' and must be narrowly tailored in pursuit of those interests." *Church of Lukumi*, 508 U.S. at 546.

The purpose of the California law is to eliminate discriminatory practices. Given this goal, California's ban on discrimination is "the least restrictive means of achieving its ends." *Roberts*, 468 U.S. at 626. "The most effective tool the state has for combatting discrimination is to prohibit discrimination; these laws do exactly that. Consequently, the means are narrowly tailored and there is no less restrictive alternative." *Swanner*, 874 P.2d at 280, n.9.

Given the state's compelling interests both in eradicating housing discrimination and in protecting the rights of privacy

and intimate association, there is no other effective alternative than simply to ban marital status discrimination.

IV. AN EXEMPTION FOR LANDLORDS WITH RELIGIOUS OBJECTIONS TO ANTIDISCRIMINATION LAWS WOULD BE UNCONSTITUTIONAL

An additional reason to reject petitioner's effort to overturn the decision by the California Supreme Court is that the exemption she seeks would favor adherents to one particular religious belief over adherents to other religious beliefs or persons with no religious beliefs. This would be an unconstitutional establishment of or preference for religion.

Both the federal and California Constitutions preclude the state from establishing or advancing any particular religion or religious beliefs.[5] U.S. Const. amend. I; Cal. Const. art. I, § 4 (West 1983). The California Constitution also forbids any religious preference. *Id.*[6]

To avoid establishment of religion, a state's action must first, have a secular legislative purpose; second, be one that neither advances nor inhibits religion; and third, not foster an excessive government entanglement with religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971). Any exemption from nondiscrimination requirements for those business owners who have religious objections to such laws would violate at least two, and likely all three, of the *Lemon* criteria. There is no secular purpose, unrelated to advancing particular religious beliefs, for such an exemption. Furthermore, any such exemption would favor those who base their discrimination on religious grounds over those who wish to discriminate

---

[5] The enactment of RFRA does not modify these guarantees. 42 U.S.C. § 2000bb-4.

[6] "The California Constitution . . . guarantees that religion shall be freely exercised and enjoyed 'without discrimination or preference.' Preference thus is forbidden even when there is no discrimination. The current interpretations of the United States Constitution may not be that comprehensive." *Fox v. City of Los Angeles*, 22 Cal.3d 792, 796, 150 Cal.Rptr. 867, 587 P.2d 663 (1978).

for other reasons. Finally, if the Commission or the courts were to excuse discrimination by those sincerely asserting religious beliefs, yet outlaw discrimination for nonreligious reasons, this would foster excessive entanglement.

Additionally, exempting an owner who discriminates because of religious beliefs would favor that owner and his or her religion at the expense of a prospective tenant who has contrary religious beliefs or no religious beliefs, and the right of that tenant to nondiscrimination in housing. This would also violate the Establishment Clause. The United States Supreme Court has clearly held that the Establishment Clause precludes a state from requiring that one person's religious beliefs control over those of other persons or over secular interests. *Estate of Thornton*, 472 U.S. at 709. The state may not favor "one religion over another nor religious adherents collectively over nonadherents." *Board of Ed. of Kiryas Joel v. Grumet*, ___ U.S. ___, 114 S.Ct. 2481, 129 L.Ed.2d 546, 556 (1994).

Here, petitioner's religious beliefs cause her to believe it is a sin to rent to unmarried couples. Another landlord may consider it is a sin to rent to interracial couples. *See, e.g., Bob Jones University*, 461 U.S. at 580 ("The sponsors of the University genuinely believe that the Bible forbids interracial dating and marriage."). Another landlord may well believe that renting to a person with a disease is abetting a sin. *See, e.g., Walker v. Superior Court*, 47 Cal.3d 112, 119, n.1, 253 Cal.Rptr. 1, 763 P.2d 852 (1988) ("Members of the Church 'believe that disease is a physical manifestation of errors of the mind.' "). Still another may refuse to rent to non-Christians. *See, e.g., Pines v. Tomson*, 160 Cal.App.3d 370, 389, 206 Cal.Rptr. 866 (1984) (directors of nonprofit religious corporation believed that "compelling them to accept advertisements from non-Christians would force appellants to subscribe to non-Christian beliefs. . . . ").

The state cannot approve discrimination based on certain religious beliefs but prohibit discrimination based on other religious beliefs, or on no religious belief, without offending the Establishment Clause. And it cannot allow those with

petitioner's beliefs to discriminate without violating California's constitutional ban on religious preferences.

CONCLUSION

Petitioner is seeking the right to discriminate in business activities affecting the public interest. The fact that she does so based on sincerely held religious beliefs does not alter the nature of the relief that she seeks.

The California Supreme Court properly focused on the legally insignificant burden that the state's anti-discrimination laws impose on petitioner's free exercise of religion. It determined that because she is operating her business for profit, not for religious motives, and because nothing in her religious beliefs requires her to be a landlord, the burden on her free exercise rights is not substantial. This conclusion is completely consistent with this Court's decisions as to what constitutes an undue burden.

"When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity." *Lee*, 455 U.S. at 261. Petitioner may believe whatever she wishes, but she has no right to force those with whom she does business to agree with her beliefs, nor to deny housing to those who disagree with her beliefs.

For the foregoing reasons, the petition for writ of certiorari to review the decision of the California Supreme Court should be denied.

Dated: August 7, 1996

EISEN & JOHNSTON LAW CORPORATION

JAY-ALLEN EISEN

*MARIAN M. JOHNSTON

*Counsel of Record for Respondent Fair Employment and Housing Commission

Supreme Court, U.S.
FILED
AUG 6 1996
CLERK

96-31

(3)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

EVELYN SMITH,

Petitioner,

v.

FAIR EMPLOYMENT AND HOUSING COMMISSION, KENNETH PHILLIPS, AND GAIL RANDALL,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of California

---

BRIEF OF RESPONDENTS KENNETH PHILLIPS AND GAIL RANDALL IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

THOMAS F. COLEMAN*
DAVID LINK
P.O. Box 65756
Los Angeles, CA 90065
(213) 258-8955

* *Counsel of Record*

36 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

SUMMARY OF REASONS TO DENY THE PETITION FOR CERTIORARI 2

1. There is no conflict with the judgment of other courts 2

2. The primary issue is not ripe for review 2

3. Factual reasons support an affirmance 3

4. It is premature to review the compelling interest issue 4

IMPORTANT FACTS WERE OMITTED FROM PETITIONER'S STATEMENT OF THE CASE 5

ARGUMENT 8

I. THE JUDGMENT BELOW DOES NOT CONFLICT WITH ANY JUDGMENT OF THIS COURT, OTHER FEDERAL COURT, OR STATE SUPREME COURT 8

a. The judgment below conforms to judgments by this Court and other federal courts 9

b. The judgment below does not conflict with judgments of other state courts confronted with this issue 11

1. Minnesota 11

2. Alaska 14

3. Massachusetts 17

II. THE PRIMARY ISSUE RAISED BY PETITIONER IS NOT RIPE FOR REVIEW 19

III. IF CERTIORARI WERE GRANTED, THE JUDGMENT BELOW WOULD HAVE TO BE AFFIRMED FOR FACTUAL REASONS 22

IV. IT IS PREMATURE TO REVIEW THE ISSUE OF COMPELLING STATE INTERESTS 24

CONCLUSION 29

TABLE OF AUTHORITIES

Cases:

Ardinale v. Louisiana,
394 U.S. 437 (1969) 28

Ansonia Board of Education v. Philbrook,
479 U.S. 60 (1986) 30

Attorney General v. Desilets,
418 Mass. 316, 636 N.E.2d 233 (1994) 17-18

Austin v. United States,
509 U.S. __, 125 L.Ed.2d 488 (1993) 29

Barr v. Matteo,
355 U.S. 171 (1957) 20

Berkemer v. McCarty,
468 U.S. 420 (1984) 20

Black v. Cutter Laboratories,
351 U.S. 292 (1956) 8

Board of Trustees, S.U.N.Y. v. Fox,
492 U.S. 469 (1989) 29

Braunfeld v. Brown,
366 U.S. 599 (1961) 30

California v. Rooney,
483 U.S. 307 (1987) 8

Chevron U.S.A. v. Natural Res. Def. Council, Inc.,
467 U.S. 837 (1984) 8, 22

Darr v. Burford,
339 U.S. 200, 227 (1950) 20

Dawson v. Mizell,
325 F.Supp. 511 (E.D. Vir. 1971) 10

EE v. Escondido,
503 U.S. __, 118 L.Ed2d 153 (1992) 28

Estate of Thornton v. Caldor,
472 U.S. 703 (1985) 10

Nostrand v. Little,
362 U.S. 474 (1960) 29

Northwest Indian Cemetery v. Peterson,
764 F.2d 581 (9th Cir. 1984) 22-23

Owen v. Baltimore & O.R. Co.,
205 F.2d 58 (2nd Cir. 1953) 10

Palmore v. Sidoti,
466 U.S. 429 (1984) 11

Patrick v. Burget,
486 U.S. 94 (1988) 28

Sherbert v. Verner,
374 U.S. 398 (1963) 9

South Ridge Baptist Church v. Industr. Comm.of Ohio,
911 F.2 1203 (6th Cir. 1990) 10

State ex rel. Cooper v. French,
460 N.W.2d 2 (Minn. 1990) 11-14

State ex rel. McClure v. Sports and Health Club,
370 N.W.2d 844 (Minn. 1985) 13

Swanner v. Anchorage Equal Rights Commission,
874 P.2d 274 (Alaska 1994) 14-17

Tony and Susan Alamo Foundation,
471 U.S. 290 (1985) 23

TWA v. Hardison,
432 U.S. 63 (1977) 9

United States v. Lee,
455 U.S. 252 (1982) 10

Webb v. Webb,
451 U.S. 493 (1981) 29

Wisconsin v. Yoder,
406 U.S. 205 (1972) 10

Constitutional and Statutory Authorities:

United States Constitution, Amendment I ..... passim

Religious Freedom Restoration Act (RFRA)
42 U.S.C. §2000bb ..... passim

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

NO. 96-31

EVELYN SMITH,

PETITIONER,

v.

FAIR EMPLOYMENT AND HOUSING COMMISSION, KENNETH PHILLIPS, AND GAIL RANDALL,

RESPONDENTS.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents Kenneth Phillips and Gail Randall jointly oppose the petition for writ of certiorari. The judgment below was correct and just. A business owner who voluntarily enters the commercial marketplace and advertises to the general public should not be given a judicially-mandated exemption from a general nondiscrimination statute. The First Amendment does not require such an exemption. Congress intended the Religious Freedom Restoration Act (RFRA) to be used as a shield from government oppression, not as a sword to harm third parties. RFRA does not legalize religious discrimination.

SUMMARY OF REASONS TO DENY THE PETITION FOR CERTIORARI

1. There is no conflict with the judgments of other courts.

The judgment below does not conflict with any judgment of this Court, nor does it conflict with the judgment of any federal court or state Supreme Court. The judgment below declined to exempt a business owner from the nondiscrimination requirements of a civil rights statute because doing so would have caused harm to identifiable third parties. No state Supreme Court and no federal court has ever granted an exemption from such a statute under these circumstances.

When either the free exercise clause of the First Amendment or RFRA (42 U.S.C. §2000bb) has been invoked in a dispute between a litigant and the government, federal courts and state Supreme Courts uniformly have refused to accommodate the religious claims of a litigant if doing so would harm a third party. This case does not depart from such a rule.

2. The primary issue is not ripe for review.

The primary issue presented by petitioner -- whether free exercise of religion is substantially burdened by a statutory ban on discrimination that prohibits a for-profit business owner from imposing a religious test as a condition of tenancy -- is not ripe for review.

In similar disputes, Supreme Courts in Massachusetts, Minnesota, and Alaska avoided deciding the "substantial burden" issue as a *federal* question under the First Amendment or RFRA. Resolution of this issue now by this Court would be

premature.

Before addressing this issue on a national scale, it would be prudent for this Court to await further analysis by other courts in order to receive the benefit of their reasoning. Cases similar to the one at bench are currently pending in the federal district court in Alaska and in intermediate appellate courts in Illinois and Michigan.

3. Factual Reasons Support an Affirmance.

Granting review on the primary issue also would be unwise because, purely as a factual matter, the state has not imposed *any* burden on Smith's exercise of religion.

Smith believes that it is a sin to engage in sexual activity outside of wedlock. It is not a sin merely for an unmarried man and woman to live together. It is the sexual act that is the sin.

The court below did not find, nor is there any evidence in the record to prove, that the tenants previously had sexual relations with each other or that they would have done so in the rental unit. Although it was in dispute below, the California Supreme Court avoided deciding this factual issue. Absent such evidence, mandatory compliance with the fair housing law does not place *any* burden on Smith's religious beliefs or practices.

It would be an unwise use of judicial resources to grant review for the purpose of deciding an important legal issue, only to discover later that certiorari was improvidently granted because, as a factual matter, the judgment below does not place any burden on petitioner's exercise of religion.

4. It is premature to review the compelling interest issue.

It also would be premature to grant review of the secondary issue presented by petitioner -- whether denial of an exemption to a business owner, under either the First Amendment or RFRA, serves a compelling state interest in the least restrictive manner. Because the court below concluded that an exemption should be denied for a more basic reason, it did not decide whether the state had one or more compelling reasons not to grant a personal exemption to Smith from the non-discrimination mandate of the fair housing statute.

Two dissenting justices wanted to reach the merits of the compelling state interests issue, but they found that there were unresolved factual issues needing further development and therefore they concluded it would be necessary to remand the case to the Commission for another hearing. However, a majority of the justices did not rule on whether the compelling state interests issue could be resolved as a matter of law or whether it would be necessary, as the dissenters suggested, to remand the case for an evidentiary hearing on that issue.

Granting review of these issues now would be premature. Even if the "substantial burden" issue were reviewed now, as a matter of comity and judicial restraint, this Court should not decide the compelling state interests issues in the first instance. The state court should be allowed to decide the compelling state interests issue before this Court does so.

Furthermore, if the court below were to decide that a proper resolution of the issue (and numerous sub-issues) requires an evidentiary hearing, this Court ultimately would have the benefit of further evidence developed at such a hearing.

IMPORTANT FACTS WERE OMITTED FROM PETITIONER'S STATEMENT OF THE CASE

Petitioner's "Statement of the Case" is factually correct, as far as it goes. However, the statement omits various facts that are necessary to a full understanding of the case.

The four rental units owned by Smith are operated exclusively for business and commercial purposes, with income generated from the rentals reported as business income. The business is not organized or classified as a religious, charitable or other nonprofit concern. See opinion of the California Supreme Court found in an appendix to the Petition, hereinafter referred to as "Opinion in Petition" at p. 3a.

When a vacancy occurs in one of the units, the unit is advertised for rent in local newspapers and is otherwise available to the general public. See Opinion in Petition, p. 3a.

The petition represented that after Smith gave respondents a tour of a vacant unit, they falsely told her they were married. See Petition, p. 3. The petition fails to mention, however, that this representation was only made by respondents *after* Smith told them the previous day in a telephone conversation that she preferred to rent to married couples. See Opinion in Petition, p. 4a.

Smith does not inquire into the sex lives of her tenants, and wouldn't know if they actually engage in sexual activities she considers sinful. See Hearing Transcript, Volume II, p. 87.

Smith did not know if Phillips and Randall had a sexual relationship or whether they even shared the same bedroom. *Id*, pp. 67-68. She just "assumed" that Phillips and Randall

engaged in sexual activities. *Id*, pp. 74, 85, 88.

Smith has no religious need to inquire into the potential sexual activities of applicants or tenants. *Id*, p. 87. For example, she does not ask tenants about their sexual orientation, whether they have boyfriends or girlfriends, or whether they have overnight guests. *Ibid.* However, her religious beliefs would cause her to evict an existing tenant if she found out that the tenant committed a single act of nonmarital sex, even if the sexual conduct occurred in a place other than her rental property, such as a hotel. *Id*, pp. 87-89.

Smith does not have any secular reasons for not renting to unmarried couples. She does not believe that unmarried couples would be irresponsible or disruptive as tenants. *Id*, p. 80. On the contrary, she believes that it is possible that an unmarried couple could be a "model tenant" from a purely secular perspective. *Id*, p. 82.

Although she has a personal belief, there is nothing in the official written doctrines of her religious denomination that prohibits a landlord from renting to an unmarried couple. See Hearing Transcript, Volume I, p. 91, 100-110. No one in her church has ever told her that she would be subject to reprimand or discipline if she rented to an unmarried couple. See Hearing Transcript, Vol. II, p. 93.

Referring to the various notice posting requirements originally ordered by the Commission, the California Supreme Court found that "the commission offered to modify its order by eliminating the notice requirements to which Smith objected." See Fn. 15 of Opinion in Petition, p. 24a. The Supreme Court therefore did not consider the "hybrid rights" issue involving the alleged violation of her free speech rights. See Opinion in

Petition, p. 24a.

Smith's argument that "hybrid rights" are involved because the regulation of her property by the fair housing statute constituted an unconstitutional taking in violation of the federal constitution was also not considered by the California Supreme Court. See Opinion in Petition, p. 24a. Just as the free speech argument is not properly before this Court because the notice posting requirements were withdrawn by the Commission, neither is the issue of a taking without just compensation properly before this Court.

Smith never made a property rights issue in the Court of Appeal, nor did the opinion of the Court of Appeal deal with property rights in its "hybrid rights" analysis. Neither was the federal "takings clause" issue properly presented to the California Supreme Court. Smith never raised such an issue in her Answer to Petition for Review and that issue was not implicit in any of the other issues presented on the granting of review. See Reply Brief of Kenneth Phillips, filed in the California Supreme Court, p. 2-3. Therefore, the federal "takings" issue was not preserved below.

ARGUMENT

I

THE JUDGMENT BELOW DOES NOT CONFLICT WITH ANY JUDGMENT OF THIS COURT, OTHER FEDERAL COURT, OR STATE SUPREME COURT

This Court "reviews judgments, not statements in opinions." *Black v. Cutter Laboratories*, 351 U.S. 292, 297 (1956); see also *California v. Rooney*, 483 U.S. 307, 311 (1987). As a result, a petition for certiorari is granted not for the purpose of correcting statements made in majority or plurality opinions, but to determine whether a "legal error resulted in an erroneous judgment . . . ." *Chevron U.S.A. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984).

Petitioner ignores this basic principle as she attempts to show a conflict that would pose a "compelling reason" to grant certiorari under this Court's Rule 10. Petitioner compares statements from the plurality opinion with statements from the opinions of other courts. Despite some asserted conflicting "statements," the fact remains that the judgment below does not conflict with any *judgment* of this Court or of any other federal court or state Supreme Court.

The judgment below denied a religiously based exemption from a civil rights statute to a for-profit business owner who advertised rental vacancies to the general public. An exemption was denied because it would have caused harm to the rights of respondent tenants. Speaking to the issue of third-party harm, the court below observed:

"The parties have not brought to our attention a single

case in which the [United States] Supreme Court exempted a religious objector from the operation of a general law when the court also recognized that the exemption would detrimentally affect the rights of third parties. Indeed, the notion that an accommodation might affect the rights of third parties led the Supreme Court in *Wisconsin v. Yoder, supra*, 406 U.S. 205, expressly to limit its holding to avoid such an implication. As limited, the decision cannot be read as authority for granting religiously based exemptions when to do so would sacrifice the rights of third parties." See Opinion in Petition, p. 38a.

A. The judgment below conforms to judgments by this Court and other federal courts.

Cases interpreting federal civil rights statutes uniformly hold that accommodation of religion is unwarranted if doing so will discriminate against or harm a third party. This Court's decision in *TWA v. Hardison*, 432 U.S. 63, 80-81 (1977), firmly established this principle in the context of employment discrimination. It has been uniformly followed by state and federal courts ever since. See cases cited below in the Opening Brief on the Merits of Kenneth C. Phillips, pp. 11-14.

The same principle has been used by this Court in its free exercise jurisprudence. When a religiously based exemption was granted from restrictions in an unemployment statute in *Sherbert v. Verner*, 374 U.S. 398, 409 (1963), this Court noted that the exemption did not "serve to abridge any other person's religious liberties." It also observed that exemptions are properly denied when the regulated conduct poses a threat to public safety, peace, or order. *Id.*, at 403.

In *Owen v. Baltimore & O.R. Co.*, 205 F.2d 58, 61 (2nd Cir. 1953), Judge Learned Hand wrote: "The First Amendment protects one against action by the government, though even then not in all circumstances; but it gives no one the right to insist that in the pursuit of their own interests others must conform their conduct to his own religious necessities." This statement was quoted with approval by this Court in *Estate of Thornton v. Caldor*, 472 U.S. 703, 710 (1985).

In *United States v. Lee*, 455 U.S. 252 (1982), this Court denied an exemption to an employer because third parties would have been harmed. The Court reasoned: "Granting an exemption from the social security taxes to an employer serves to impose the employer's religious faith on the employees." *Id*, at 261.

Other federal cases agree that the accommodation of the free exercise of religion does not contemplate causing harm to third parties. See *South Ridge Baptist Church v. Industrial Commission of Ohio*, 911 F.2 1203 (6th Cir. 1990) [employer denied exemption from workers' compensation system because religious accommodation would harm employees who had a right to benefits if they were hurt on the job]; *Dawson v. Mizell*, 325 F.Supp. 511 (E.D. Vir. 1971) [worker denied exemption from mandatory work on Saturday because exemption would have violated the rights of other workers under union contract].

In a civil rights context, no federal case has been discovered in which a business owner was granted a religiously based exemption that entitled the owner to discriminate against a tenant or employee. Apparently, judges have heeded this Court's admonition that courts "must not ignore the danger that an exemption from a general obligation of citizenship on religious grounds may run afoul of the Establishment Clause."

Wisconsin v. Yoder, 406 U.S. 205, 221 (1972).

As this Court observed in *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984), "Private biases may be outside the reach of the law, but the law cannot directly or indirectly, give them effect." A judicially-mandated exemption from a civil rights statute would have the effect of permitting discrimination against prospective tenants which would violate this principle.

B. The judgment below does not conflict with judgments of other state courts confronted with this issue.

Petitioner suggests that the judgment of the California Supreme Court conflicts with judgments of the supreme courts of Minnesota, Alaska, and Massachusetts. See Petition, p. 20. A close analysis of the cases cited by petitioner shows that none of these *judgments* is in conflict. In each of these cases, the state supreme court declined to grant an exemption to a for-profit landlord who discriminated against tenants whose alleged conduct violated the landlord's religious beliefs.

Furthermore, as petitioner concedes, none of these courts decided a *federal* constitutional issue, inasmuch as "these state supreme courts interpreted their state constitutions' free exercise clauses in these landlord cases ...." See Petition, p. 20. While some of these courts looked to federal law for guidance, the fact remains that the judgments in these cases rested solely on state law, with the exception of Alaska which rested its judgment (in favor of the tenants) in part on RFRA.

1. Minnesota

The first reported appellate decision similar to the case at bench arose in Minnesota. *State ex rel. Cooper v. French*,

460 N.W.2d 2 (Minn. 1990).

While the Supreme Court of Minnesota entered a judgment in favor of the landlord, it was rendered solely as a matter of state law. In Part I of the opinion of three justices, a plurality of the court concluded that as a matter of statutory construction the term "marital status" in the fair housing law was not intended by the legislature to prohibit discrimination against unmarried couples. *Id*, pp. 3-8. Justice Simonett joined the plurality to form a majority on the issue of statutory interpretation, stating: "I join in Part I of the court's opinion. Because the issue of statutory construction is dispositive here, I do not reach the constitutional questions." *Id*, p. 11.

Petitioner has distorted the holding of *French* by arguing that the Minnesota Supreme Court "found that prosecuting landlords for marital status discrimination for refusing to rent to unmarried couples **substantially** burdened their exercise of religion." See Petition, pp. 14, 20, 22. (Emphasis added.)

The plurality opinion in *French* focused solely on the state constitution. The state constitution does not protect the "exercise of religion" and does not contain a "substantial burden" test. Rather, it protects "liberty of conscience" which triggers a compelling interest test "whenever rights of conscience are burdened." *French, supra*, p. 9. Thus, under the state constitution, **any** burden on liberty of conscience must be justified by a compelling interest. This is not analogous to RFRA which requires a more stringent showing that government action imposes a "substantial burden" on the "exercise of religion." The plurality opinion in *French* acknowledged this difference, concluding that the state constitution "grants far more protection of religious freedom than the broad language of the United States Constitution." *Id*,

pp. 9-10. Thus, despite petitioner's assertion to the contrary, the three justices in the plurality did not conclude that the fair housing law imposed a "substantial burden" on the landlord's exercise of religion.

Three dissenting justices in *French*, however, did focus on the "first amendment right to free exercise of religion." *Id*, p. 13. While the dissenters acknowledged there was some burden imposed on the landlord by the fair housing law *(Id*, p. 14), they did not conclude that it was a substantial burden within the meaning of the federal constitution.

The dissenters stated that "by entering the public marketplace one is subjecting oneself to laws concerning public behavior, including antidiscrimination laws . . . ." *Id*, p. 15. This observation is consistent with an earlier judgment of that court. *State ex rel. McClure v. Sports and Health Club*, 370 N.W.2d 844, 853 (Minn. 1985) [voluntary entry into the commercial marketplace subjects a business owner to civil rights statutes prohibiting discrimination]. The dissenters in *French* explained:

> "Upon entering the public marketplace appellant could no longer consider just his rights and beliefs, but became subject to certain state laws and the rights of potential tenants. The legislature has not exempted an isolated sale or rental of property other than the property where the landlord resides. As respondent states, 'the First Amendment does not bestow upon the individual an absolute right to require others in the marketplace to adopt those values as a precondition to doing business with him or her.' Appellant is free, in his private life, not to associate with anyone whom he feels has the 'appearance of evil,' but when someone voluntarily enters the public marketplace he may encounter laws that are

inconsistent with his religious beliefs. While the Act imposes a burden on French's sincerely held religious beliefs that living together is a sin, such a burden is greatly lessened because it occurred only when French voluntarily entered into the rental marketplace ...." *Id*, p. 15.

Therefore, a careful reading of *French* reveals that neither the plurality nor the dissenters concluded that the fair housing law imposed a "substantial burden" on the landlord. While six justices found there was a burden, none found a "substantial burden" as is required by RFRA in order to trigger a compelling interest analysis. As a result, there is no conflict between *French* and the opinion below, even if this Court were to compare "statements in opinions" rather than the actual "judgments" of the two cases.

2. Alaska

Petitioner argues that in *Swanner v. Anchorage Equal Rights Commission*, 874 P.2d 274, 281 (Alaska 1994), "every justice on the court found that the government had substantially burdened the landlord's rights under the compelling state interests test by prosecuting him." See Petition, p. 22.

There is no basis to this claim. *Swanner* did not use a "substantial burden" test in analyzing whether Swanner should be exempt from the fair housing law.

In its analysis of the state constitution's free exercise clause, the court held that the burden of proof shifted to the state to show a compelling interest if three criteria were met: "(1) religion is involved, (2) the conduct in question is religiously based, and (3) the claimant is sincere in his/her

religious belief." *Swanner*, 874 P.2d, p. 281. The court found that all three criteria were met and therefore went on to analyze whether the state could show a compelling interest to forbid marital status discrimination in housing transactions. Nowhere did the court discuss whether the statute imposed a "substantial burden" on the exercise of religion.

The court did, however, acknowledge that the fair housing law placed some burden on Swanner, but concluded that the burden was not constitutionally significant, explaining:

> "It is important to note that any burden placed on Swanner's religion by the state and municipal interest in eliminating discrimination in housing falls on his conduct and not his beliefs. Here, the burden on his conduct affects his commercial activities. In *United States v. Lee*, 455 U.S. 252 (1982), the United States Supreme Court stated the distinction between commercial activity and religious observance:
>
> 'When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith, are not to be superimposed on the statutory schemes which are binding on others in that activity.' *Id.* at 261." *Swanner*, p 283.

The court gave further reasons why the burden Swanner assumed when he voluntarily entered a regulated industry was not a constitutionally significant burden, stating:

> "Swanner has made no showing of a religious belief which requires that he engage in the property-rental business. Additionally, the economic burden, or

'Hobson's choice,' of which he complains, is caused by his choice to enter into a commercial activity that is regulated by anti-discrimination laws. Swanner is voluntarily engaging in property management. The law and ordinance regulate unlawful practices of the rental of real property and provide that those who engage in those activities shall not discriminate on the basis of marital status. [citation] Voluntary commercial activity does not receive the same status accorded to directly religious activity. [citation]

'As [James] Madison summarized the point, free exercise should prevail in every case where it does not trespass on private rights or the public peace.' Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 Chi. L. Rev. 1109, 1145 (1990) (citation omitted). Because Swanner's religiously impelled actions trespass on the private right of unmarried couples not to be unfairly discriminated against in housing, he cannot be granted an exemption from the housing anti-discrimination laws." *Swanner, supra*, pp. 283-284.

The court in *Swanner* did not utter a word about whether the fair housing laws imposed a "substantial burden" on Swanner under RFRA. Instead, it began and ended its analysis of RFRA with a finding that the nondiscrimination laws promoted a compelling interest in the least restrictive manner. On this score, the court concluded:

"Assuming that the Act is constitutional and applies to this case, it does not affect the outcome, because we hold in the next section that compelling state interests support the prohibitions on marital status discrimination. The most effective tool the state has for combating

discrimination is to prohibit discrimination; these laws do exactly that. Consequently, the means are narrowly tailored and there is no less restrictive alternative." *Swanner, supra*, 874 P.2d, p. 280, fn. 9.

Therefore, not only is the judgment of the Alaska Supreme Court consistent with the judgment of the California Supreme Court, statements in the *Swanner* opinion are consistent with criteria used in the plurality opinion below to determine whether a substantial burden exists. In other words, the two cases are not in conflict either in their judgments or in principles used to reach those judgments.

3. Massachusetts

Petitioner claims that the judgment below conflicts with the decision of the Massachusetts Supreme Court in *Attorney General v. Desilets*, 418 Mass. 316, 636 N.E.2d 233 (1994). See Petition, pp. 20-21. However, although some statements in the plurality opinion in *Desilets* may conflict with some statements in the plurality opinion below, the judgments are consistent. In each case the state Supreme Court reversed a lower court judgment that had granted an exemption to a landlord from a fair housing statute.

In *Desilets*, the Attorney General had filed suit in superior court alleging that the defendant had violated a state statute prohibiting marital status discrimination. The superior court granted a summary judgment for the landlord. Reversing that decision, the Supreme Court concluded that "the summary judgment for the defendants should be vacated." *Desilets, supra*, 636 N.E.2d, p. 235. The court reversed solely on the basis of the state constitution and found that no further discussion of rights under the First Amendment or RFRA was

necessary. *Id*, p. 236 and fn. 5.

A plurality opinion (three justices concurring), found that the fair housing law placed a "substantial burden" on the defendants' right to free exercise of religion under the state constitution. *Id*, p. 235-238. Justice Liacos concurred with the result reached by the plurality, and agreed "with the court's analysis of the protections provided the people of this Commonwealth under art. 46, § 1, of the Massachusetts Constitution ...." *Id*, p. 243. Therefore, these opinions rest on adequate and independent state grounds with respect to the issue of "substantial burden."

In any event, there is no conflict between the judgment in *Desilets* and the judgment below. In both cases the state supreme courts reversed judgments of lower courts that had been in favor of the landlords.

Furthermore, there is no conflict between the judgment below and the opinions of the courts in Massachusetts, Alaska, or Minnesota. Each of these other three cases were decided under the state constitutional provisions. Only in Alaska did the court specifically address a federal question and in doing so it issued a judgment for the tenants. As a result, there is no compelling reason to grant certiorari to resolve conflicting judgments on any federal issue since no such conflict exists.

II

THE PRIMARY ISSUE RAISED BY PETITIONER IS NOT RIPE FOR REVIEW

State Supreme Courts have unanimously refused to grant exemptions to for-profit landlords from the anti-discrimination mandate of fair housing statutes. These courts have sent a clear message to business owners who voluntarily enter the commercial marketplace in a religiously diverse society. The message is simple: you may not impose a religious test on consumers and refuse to do business with those who do not conform their conduct to your religious beliefs.

As argued above, this message does not conflict with any judgment of this Court or of any other federal court. While the case at bench contains issues that are fascinating from an academic perspective, certiorari does not exist for the purpose of answering academic questions.

RFRA is a relatively new statute. It would be prudent for this Court to allow issues concerning the constitutionality and application of RFRA to percolate longer, before this Court issues the final word that will bind the entire nation for years to come. Disputes involving the limits to be placed on religious liberty in a pluralistic society are difficult to resolve. It is wise to allow such issues to be developed by state courts and lower federal courts over time so that when this Court does enter the fray it will have the benefit of more years of judicial experience and analysis than presently exist.

"[N]o matter how much [the parties] may favor the settlement of an important question of constitutional law, broad considerations of the appropriate exercise of judicial power

prevent such determinations unless actually compelled by the litigation before the Court." *Barr v. Matteo*, 355 U.S. 171, 181 (1957). "Indeed, this principle of restraint grows in importance the more problematic the constitutional issue is." *Berkemer v. McCarty*, 468 U.S. 420, 446 (1984) (Stevens, J., concurring).

This is one of those occasions when the petition for certiorari should be denied because the substantial burden issue is "not ripe enough" and the question would "better await the perspective of time." *Darr v. Burford*, 339 U.S. 200, 227 (1950) (Frankfurter, J., dissenting).

Other cases similar to the case at bench are currently winding their way through lower and intermediate state and federal courts.[1] Someday one of them will probably reach this

---

1. The case of *Jasniowski v. Rushing* is currently pending in the Illinois Court of Appeal, case number 95-0365. In that case, a trial court entered a judgment against a landlord who had refused to rent to an unmarried couple. The trial court denied an exemption under the state and federal constitutions and RFRA, finding that the law prohibiting discrimination did not impose a substantial burden on the landlord's exercise of religion. The landlord appealed. Oral argument on appeal has occurred and a written opinion soon will follow. The opinion of the lower court is attached to a "Request for Judicial Notice" filed in the California Supreme Court in the case at bench.

The case of *McCready v. Hoffius* is pending in the Michigan Court of Appeal, case number 185152. There, the trial court ruled for the landlord solely on statutory grounds. The landlord, however, continues to press the religious liberty exemption in the appellate proceedings. Oral argument is expected in the next few months.

The case of *Thomas v. Anchorage Equal Rights Commission*

Court, which will be time enough to resolve the issue petitioner seeks to have reviewed now.

Granting review on the primary issue raised by petitioner will also require review of the following preliminary question that is subsumed within the main issue: What is the exercise of religion?

In the court below, Respondent Randall challenged petitioner's claim that any conduct that is motivated by religious belief is, of necessity, the "exercise of religion" within the meaning of the First Amendment and RFRA. Randall devoted much of her brief to this issue. See Opening Brief on the Merits on Behalf of Gail Randall, Real Party in Interest, pp. 4-25.

Randall argued that, as a threshhold issue, a court must determine whether the conduct of a religious believer is the "exercise of religion" before the court should concern itself with the "substantial burden" issue or any other tests required by RFRA or the First Amendment. *Id*, pp 5-7. She argued that religious belief is not the same as the "exercise of religion," pointing out that RFRA specifically does not trigger a compelling interest test merely because a government regulation offends a litigant's religious belief. *Ibid.* She also argued that religious believers who enter the marketplace for personal profit

---

is pending in the federal district court in Alaska, case number A95-0274-CV (HRH). There, landlords who did not agree with the *Swanner* decision filed suit in federal court claiming that *Swanner* violated their rights under RFRA and sought an injunction to prohibit the City of Anchorage and the State of Alaska from enforcing the ban on marital status discrimination against landlords who object to the fair housing laws for religious reasons. A hearing on a motion for summary judgment is scheduled for August 26, 1996.

cannot claim that religious motivation transforms their non-religious conduct into the "exercise of religion." *Id*, pp. 14-19.

The court below only touched upon this issue, stating: "While the renting of apartments may not be the exercise of religion, if Smith claims the laws regulating that activity indirectly coerce her to violate her religious beliefs, we cannot avoid testing her claim under the analysis codified in RFRA." See Opinion in Petition, p. 28a.

However, if review is granted, this issue will be before this Court as a preliminary question necessarily included in the larger question presented by petitioner. Furthermore, respondent "may rely on any ground that finds support in the record" as a basis to uphold the judgment below. *Chevron U.S.A., supra*, 467 U.S., p. 842, fn. 7.

The Supreme Court of Massachusetts recognized that decisions of this Court have "accepted, either implicitly or without searching inquiry," that any conduct motivated by religious belief is the exercise of religion. *Desilets, supra*, 636 N.E.2d, p. 237. Granting review in this case will require a probing examination and explicit ruling on this fundamental constitutional question.

III

IF CERTIORARI WERE GRANTED, THE JUDGMENT BELOW WOULD HAVE TO BE AFFIRMED FOR FACTUAL REASONS

Being required to rent to unmarried couples, especially in the absence of any evidence that they would engage in sexual relations inside the rental property, does not "substantially

burden" the exercise of Smith's religion. Smith has the burden of proof to demonstrate that her religious beliefs were substantially burdened in this case. *Northwest Indian Cemetery v. Peterson*, 764 F.2d 581, 585 (9th Cir. 1984). An **actual** burden must be proven. *Tony and Susan Alamo Foundation*, 471 U.S. 290, 304 (1985).

Smith has not met this burden of proof. Her decision not to rent to Phillips and Randall was based on her assumption that they would engage in sexual conduct inside the rental apartment. See Hearing Transcript, Vol. II, pp. 67-68, 88.

When the case was in the Court of Appeal, Smith relied on a so-called presumption in state law that an unmarried man and woman who live together are engaging in sexual intercourse. Petitioner's Response Memorandum, p. 3. She further argued that: "[t]he complainants and the State have a burden to rebut the legal presumption of sexual activity." *Ibid.*

The Court of Appeal did not address this issue, nor did the California Supreme Court when it was raised again by Smith in that court. In the Supreme Court, Smith argued that she was entitled to rely on a legal presumption of sexual activity in order to satisfy her burden of proof that her exercise of religion had been substantially burdened. See Brief of Evelyn Smith, Petitioner, pp. 17-19. Phillips argued that as a factual matter there was no burden on Smith's exercise of religion and that no such legal presumption existed in California law. See Opening Brief of the Merits of Kenneth C. Phillips, "Phillips Opening Brief," pp. 47-49. The Supreme Court apparently found it unnecessary to decide this issue because instead it found, as a matter of law, that Smith's exercise of religion was not substantially burdened.

If a writ of certiorari is issued to review the judgment below, it will be necessary for this Court to decide whether Smith has factually proven that a substantial burden exists. The resolution of this issue would require an analysis of unsettled questions of state law.

However, if certiorari were granted, a resolution of these intricate state law issues would be necessary to determine if Smith's religious liberty was *in fact* burdened.

IV

IT IS PREMATURE TO REVIEW THE ISSUE OF COMPELLING STATE INTERESTS

Petitioner asks for review of a secondary issue -- whether California has a compelling state interest sufficient to override Smith's religious liberty rights. See Petition, p. 25. Petitioner claims that the majority of the California Supreme Court "sidestepped" this question and "refused" to rule on it. *Ibid.* She urges this Court to decide it in the first instance.

The court below did not "refuse" to rule on or "sidestep" the numerous factual and legal issues involved in the many compelling state interests raised by respondents as justification for denying an exemption to Smith. Rather, it did what any responsible court would do. After deciding one preliminary issue that required a judgment for respondents, it properly left to another day the resolution of a myriad of other constitutional questions that were in dispute but the resolution of which was unnecessary to its judgment. The court's action in this regard is an excellent manifestation of judicial restraint.

Petitioner claims that the compelling state interest issue

in this case "is a question of law, so there is no reason to remand it back to the California Supreme Court." See Petition, p. 25. That may or may not be true. Two of the dissenting justices below concluded that the matter of compelling state interests could not be resolved as a matter of law. They found that the case should be sent back to the Commission for a hearing at which the state would be required to produce evidence in support of its contention that the denial of an exemption was supported by compelling state interests. See Opinion in Petition, pp. 106a-107a, 153a-154a. Neither Justice Mosk's opinion nor the plurality opinion reached any conclusion on the matrix of compelling state interests, including whether they could be resolved as a matter of law or whether an evidentiary hearing was necessary to their resolution.

Petitioner claims that the compelling state interests issue was "fully briefed" in the California Supreme Court. See Petition, p. 25. That is partially true. Respondent Phillips advanced several compelling state interests in the state Supreme Court but they were not answered by petitioner. In his reply brief in the state Supreme Court, respondent pointed out:

> "Phillips cited eight compelling interests served by denying Smith an exemption from laws prohibiting marital status discrimination in housing. [Phillips Opening Brief, (POB), 37-46.] Smith failed to address any of these arguments, except for a limited discussion of portions of Phillips' privacy arguments. For example, Phillips argued that:
>
> "***Avoiding Violations of Federal Law.*** The state has a compelling reason to deny Smith the exemption she seeks because such a judicial exemption would place the state's approval on religiously motivated discrimination in

housing -- conduct that is forbidden by federal fair housing law. (POB, 37.) Smith does not respond to this argument.

"***Combating Religious Discrimination***. Smith is not only engaging in marital status discrimination but her conduct constitutes religious discrimination as well, and the state has a compelling interest to eradicate religious discrimination by business owners and to avoid official complicity in such conduct. (POB, 37) Smith does not address this argument.

"Providing Efficient Administrative Relief. By granting exemptions for religious reasons, the court will be creating a system that will require extensive administrative hearings and further judicial proceedings in every case in which a religious claim is made by a business owner, thus destroying the current system that was designed by the Legislature to provide efficient administrative resolution of fair housing disputes. The state has a compelling interest in keeping an efficient dispute resolution system available to landlords and tenants. (POB, 38-39.) Smith does not address this argument.

"Equal Opportunity and Personal Dignity. Civil rights laws prohibiting arbitrary discrimination on bases that would not be 'suspect classifications' in an equal protection analysis, e.g., age, marital status, disability, sexual orientation, nonetheless promote compelling interests by providing equal opportunity to accessing the necessities of life and by protecting the personal dignity of consumers and employees from affront. (POB, 40-42.) Smith ignores this argument.

"***Personal Safety and Economic Security***. Considering today's economic conditions and high crime rate, many unmarried adults choose to live together for reasons of economic security and personal safety. The ban on marital status discrimination serves a compelling interest by removing arbitrary barriers to decisions by unmarried adults to share housing accommodations. (POB, 46.) Smith does not respond to this argument." See Reply Brief of Kenneth C. Phillips, pp. 7-8.

Therefore, in addition to the possible need for remand to determine various factual issues in dispute, many of the legal issues involved in the compelling state interest question were not fully briefed. Furthermore, even on the issues that were fully briefed, the Court properly did not decide them.

On the right of privacy the court below stated: "Randall, Phillips, and the commission argue that the right to privacy is one of several compelling interests, embodied in [the state statute], that justify the law's application to Smith over her religious objections.... Our conclusion makes it unnecessary to address the argument. See fn. 6 of Opinion in Petition, p. 9a.

The court also indicated: "Were we to adopt Smith's interpretation of Government Code section 12955, however, we would need to reconcile it, if possible, with the holding that persons in this state have a constitutional right to live with others who are not related by blood, marriage, or adoption, as an aspect of the right of privacy. (*City of Santa Barbara v. Adamson* (1980) 27 Cal.3d 123, 130-137.)" See fn. 10 of Opinion in Petition, p. 16a.

Responding to arguments that the federal constitution's establishment clause places limits on RFRA, the court observed:

"The parties opposed to Smith argue that RFRA cannot constitutionally be applied to enforce rights under the free exercise clause at the expense of the constitutional rights of third parties .... The conclusion set out below ... that RFRA does not require the state to accommodate Smith's religiously motivated housing discrimination ... makes it unnecessary to consider her opponents' specific argument about the limits of congressional power. See fn. 16 of Opinion in Petition, p. 25a.

After reiterating that it was not addressing various legal disputes involving the compelling state interest test, the court added: "Nor do we need to consider the contention of Randall, Phillips, and the commission that to permit Smith to discriminate on religious grounds would violate the establishment clauses of the federal and state Constitutions. (U.S. Const., 1st Amend.; Cal. Const., art. I, § 4; *see Larkin v. Grendel's Den, Inc.* (1982) 459 U.S. 116 [invalidating, as an establishment of religion, state law empowering the governing bodies of churches to veto applications for liquor licenses].)" See fn. 21 of Opinion in Petition, p. 41a.

Such constitutional questions should not be decided by this Court in the first instance. "[I]n a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge...." *Ardinale v. Louisiana*, 394 U.S. 437, 439 (1969).

In reviewing state court judgments, this Court "has, with very rare exceptions, refused to consider petitioner's claims that were not raised or addressed below." *EE v. Escondido*, 503 U.S. __, 118 L.Ed2d 153, 169 (1992). "This Court usually will decline to consider questions presented in a petition for certiorari that have not been considered by the lower court." *Patrick v. Burget*, 486 U.S. 94, fn. 5 (1988).

"[A]lthough the States are sovereign entities, they are bound along with their officials, including their judges, by the Constitution and the federal statutory law. Principles of comity in our federal system require that the state courts be afforded the opportunity to perform their duty, which includes responding to attacks on state authority based on the federal law .... *Webb v. Webb*, 451 U.S. 493, 499 (1981).

Whether for reasons of "comity" (*Nostrand v. Little*, 362 U.S. 474, 476 (1960)), "judicial economy" (*Board of Trustees, S.U.N.Y. v. Fox*, 492 U.S. 469, 485 (1989)), or because "prudence" dictates judicial restraint (*Austin v. United States*, 509 U.S. __, 125 L.Ed.2d 488, 505 (1993)), review of these issues should be denied.

CONCLUSION

The petition for certiorari should be denied. The judgment below is fair and just. It does not conflict with any judgment of this Court or any other federal court or state Supreme Court.

Furthermore, the judgment need not be as burdensome to petitioner as she claims. She will not have to sell her rental units in order to remain true to her religious beliefs, although she might chose to do so. If she does decide to sell, she could invest the proceeds, including any profits, in other capitalistic ventures that will not put her in direct contact with the public and therefore will not be likely to offend her religious sensibilities.

Nor does copliance with the law necessarily come at any economic expense to petitioner. Neither the state, nor

petitioner's religion, requires her to delve into the sexual activities of prospective tenants or to make assumptions about such intimate matters. At no financial cost, petitioner can protect her religious beliefs from potential offense by not inquiring or making such assumptions.

Petitioner also has another reasonable option. She could hire a property management company to fill vacancies that might occasionally occur, thereby insulating herself from possibly being offended by prospective tenants who do not share her religious beliefs. Hiring an agent may have a minimal cost. However, a religion-neutral law that happens to make religious exercise more expensive does not violate either the federal constitution or RFRA. *Braunfeld v. Brown*, 366 U.S. 599, 606 (1961). Furthermore, an adherent sometimes may endure a financial cost in order to comply with the demands of her religion. *Ansonia Board of Education v. Philbrook*, 479 U.S. 60 (1986).

Respectfully submitted:

THOMAS F. COLEMAN*
DAVID LINK
P.O. Box 65756
Los Angeles, CA 90065
(213) 258-8955
* Counsel of Record

July 31, 1996

MOTION FILED
AUG 7 1996

(4)

No. 96-31

In The
Supreme Court of the United States
October Term, 1996

EVELYN SMITH,

Petitioner,

vs.

FAIR EMPLOYMENT AND HOUSING COMMISSION, KENNETH PHILLIPS, AND GAIL RANDALL,

Respondents.

On Petition for Writ of Certiorari
to the Supreme Court of California

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF DEFENDERS OF PROPERTY RIGHTS IN SUPPORT OF THE PETITIONER

Nancie G. Marzulla
Counsel of Record
Barry C. Hodge
DEFENDERS OF
PROPERTY RIGHTS
6235 33rd St., NW
Washington, DC
20015-2405
(202) 686-4197

August 7, 1996

29 pp

No. 96-31

In The
Supreme Court of the United States
October Term, 1996

EVELYN SMITH,
Petitioner,

vs.

FAIR EMPLOYMENT AND HOUSING COMMISSION, KENNETH PHILLIPS, AND GAIL RANDALL,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of California

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF DEFENDERS OF PROPERTY RIGHTS IN SUPPORT OF THE PETITIONER

Defenders of Property Rights (Defenders), moves this Court pursuant to Rule 21.2(b) of the Rules of this Court for leave to file the attached brief *amicus curiae* to present arguments stating why the Petitioner's petition for a writ of certiorari should be granted. This case raises significant issues regarding the power of a state to destroy constitutionally protected property rights through anti-

discrimination legislation. Specifically, the State of California has denied the Petitioner's constitutionally protected right to exclude others from her property. Furthermore, the State has not shown that its law banning discrimination against unmarried cohabiting couples substantially advances a legitimate state interest justifying the infringement of constitutionally protected property rights.

Defenders' mission is to vigorously protect constitutionally protected property rights. Attorneys of Defenders have been counsel of record or *amicus curiae* in numerous significant property rights cases nationwide involving government decisions affecting private property rights. *E.g.*, *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Dolan v. City of Tigard*, 114 S.Ct. 1003 (1994); and *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 115 S.Ct. 714 (1995). Defenders has also devoted a significant portion of its resources to the litigation of regulatory taking issues across the country on behalf of property owners whose rights have been infringed in violation of the Fifth Amendment. Thus, Defenders is in unique position to illustrate the gravity of the California

Supreme Court's decision upon residential property owners nationwide. More importantly, the information presented in the attached brief will assist this Court in resolving the important constitutional issues at stake in this case.

Counsel for the Petitioner and counsel for Respondent California Fair Employment and Housing Commission, has consented to the filing of the attached brief *amicus curiae* and such consent has been lodged with the Clerk of this Court. Counsel for all other Respondents have refused to consent to the filing of the attached brief *amicus curiae* thereby necessitating the filing of this motion.

For the foregoing reasons, Defenders respectfully requests that this Court grant this motion.

Nancie G. Marzulla
Counsel of Record
DEFENDERS OF PROPERTY RIGHTS
6235 33rd Street, N.W.
Washington, DC 20015
(202) 686-4197

Dated: August 7, 1996

QUESTIONS PRESENTED FOR REVIEW

Whether the right to exclude others from private property is extinguished when the property is made available for rent?

Whether the right of a property owner to decide who may reside on her property -- which is a fundamental right of private property ownership -- may be destroyed without a showing that the ordinance substantially advances a legitimate and superior state purpose?

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW.....i

TABLE OF AUTHORITIES.....iii

IDENTITY AND INTEREST OF AMICUS CURIAE.....1

STATEMENT OF THE CASE.....1

SUMMARY OF ARGUMENT 6

REASONS WHY THE PETITION SHOULD BE GRANTED.....11

I. THE RIGHT TO EXCLUDE OTHERS FROM ONE'S PROPERTY IS ONE OF THE MOST FUNDAMENTAL ASPECTS OF PRIVATE PROPERTY OWNERSHIP 11

II. IN SHARP CONTRAST, THERE IS NO CONSTITUTIONAL RIGHT OF UNMARRIED PERSONS TO LIVE TOGETHER 13

III. EXTINGUISHING THE RIGHT OF A PROPERTY OWNER TO EXCLUDE OTHERS FROM HER PROPERTY WITHOUT PAYMENT OF JUST COMPENSATION VIOLATES THE FIFTH AMENDMENT 16

CONCLUSION.....20

TABLE OF AUTHORITIES

CASES

Andrus v. Allard, 444 U.S. 51 (1979) 7

Attorney General v. Desilets, 418 Mass. 316, 636 N.E.2d 233 (1993) 9

Cooper v. French, 460 N.W.2d 2 (Minn. 1990) 9

Dolan v. City of Tigard, 114 S. Ct. 2309 (1994) 4,16

Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) 4

Hodel v. Irving, 481 U.S. 704 (1987) 8,12

International News Serv. v. Associated Press, 248 U.S. 215 (1918) 8

Kaiser Aetna v. United States, 444 U.S. 164 (1979) 2,4,12,18

Loretto v. Teleprompter Manhatten CATV Corp., 458 U.S. 419 (1982) ..... *passim*

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) 2,11

Moore v. City of East Cleveland, 431 U.S. 494 (1977) 5,6,18

Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) 17

TABLE OF AUTHORITIES -cont.

Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978) 7

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) 15,19

Prune Yard Shopping Center v. Robins, 447 U.S. 74 (1980) 4

Swanner v. Anchorage Equal Rights Commission, 115 S. Ct. 460 (1994) 9

United States v. Causby, 328 U.S. 256 (1946) 12

United States v. General Motors Corp., 323 U.S. 373 (1945) 11

Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) 8,13,14

Yee v. City of Escondido, California, 503 U.S. 519 (1992) 2,3,7

MISCELLANEOUS

Laycock & Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 Tex.L.Rev. 209 (1994) 9

No. 96-31

In The
Supreme Court of the United States
October Term, 1996

EVELYN SMITH,
Petitioner,

vs.

FAIR EMPLOYMENT AND HOUSING COMMISSION, KENNETH PHILLIPS, AND GAIL RANDALL,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of California

BRIEF OF DEFENDERS OF PROPERTY RIGHTS AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

Nancie G. Marzulla
Counsel of Record
Barry C. Hodge
DEFENDERS OF PROPERTY RIGHTS
6235 33rd St., NW
Washington, DC
20015-2405
(202) 686-4197

August 7, 1996

Pursuant to Rule 37.2 of the Rules of this Court, *amicus curiae* submits this brief in support of the Petitioner.

IDENTITY AND INTEREST OF *AMICUS CURIAE*

Defenders of Property Rights is the nation's only legal defense foundation devoted exclusively to protecting private property rights. Defenders was founded as a non-profit, public interest firm in 1991 in recognition that property rights are today under siege by excessive government regulations and actions which have the effect of rendering the Fifth Amendment's Just Compensation Clause worthless. Defenders' mission is to vigorously protect those rights considered essential by the framers of the Constitution, and to promote a better understanding of the relationship between private property rights and other individual rights such as religious liberty.

STATEMENT OF THE CASE

At issue in this case is the nature and extent of what this Court has historically and repeatedly described as the most fundamental right of private property ownership. Namely, the right to exclude others.

There is, of course, no question but that the right to exclude others from one's private property is fundamental to the very notion of private property ownership.[1] *See, e.g., Kaiser Aetna*, 444 U.S. 164 (1979). Indeed, numerous decisions of this Court have underscored this venerable principle of constitutional law. Justice Thurgood Marshall explained the principle most succinctly when he stated: "The right to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights." *Loretto v. TelePrompter Manhattan CATV Corp.*, 458 U.S. 419, 443 (1982).

On the other hand, recent decisions by this Court suggest that the right to exclude others may be compromised when a property owner makes his property available as a rental unit. Specifically, in *Yee v. City of Escondido, California,* 503 U.S. 519 (1992), this Court faced a challenge to a rent control statute that required owners of mobile home units maintain rents at a certain rate, even when the mobile homes were sold. The park owners argued that the rent control

---

[1] Indeed, in the instant case the Petitioner is forced to choose between the exercise of two constitutionally protected rights: the right to make reasonable use of her private property, *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003 (1992), and the right to free exercise of religious beliefs.

statute required them to acquiesce to an unwanted physical occupation of their private property by forcing them to keep lessees on their property who paid less rent than the lessors wished. The *Yee* Court flatly rejected this argument, holding that the rent control ordinance did not authorize an unwanted physical occupation of the park owners' property. *Id.* at 53

Some might argue that *Yee* stands for the proposition that because Petitioner -- in the instant case -- has voluntarily made her property available to others to rent, she has lost any and all claim to the constitutional right to exclude unwanted members of the public -- such as unmarried couples -- from her property. But, in point of fact, this Court has never addressed the extent to which the right to exclude is modified or extinguished when the property is made available for rent:

> [T]he Takings Clause requires compensation if the government authorizes a compelled physical invasion of property. But the Escondido rent control ordinance did no such thing. Petitioners voluntarily rented their land to mobile home owners. . . . Put bluntly, no government has required any physical invasion of petitioners' property. Petitioners' tenants were invited by petitioners, not forced upon them by the government.

Id. at 527-28.

This is not to suggest, however, that a property owner's ability to choose to whom he rents his property to is not subject to reasonable regulatory and constitutional requirements. *See, e.g., Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964)(law prohibiting motel owners from discriminating against individuals protected by the Fourteenth Amendment is legitimate exercise of Commerce Clause power) and *Prune Yard Shopping Center v. Robins,* 447 U.S. 74, 82-84 (1980)(property owners not free to exclude members of public whose rights to exercise free speech protected by state constitution).

However, numerous decisions of this Court have held that the right of a property owner to choose who may enter his property -- and who he may exclude from his property -- is not extinguished when the property is opened up to the public in general. *See, e.g., Dolan v. City of Tigard,* 114 S. Ct. 2309 (1994)(owner of commercial plumbing supply store open to the public not required to grant public easement as a condition of obtaining expansion permit) and *Kaiser Aetna v. United States,* 444 U.S. 164 (1979)(privately owned marina open to paying members of the public not converted into

public property by virtue of its being joined to navigable waters of the United States).

Finally, in 1977, this Court struck down a housing ordinance that limited occupancy of a dwelling unit to members of a single family, defining "family" to preclude a grandmother living with her two grandchildren, as being "a means not reasonably related to the ends it seeks to achieve." *Moore v. City of East Cleveland*, 431 U.S. 494, 500 (1977)(plurality). Justice Stevens in his concurring opinion wrote:

> In my judgment the critical question presented by this case is whether East Cleveland's housing ordinance is a permissible restriction on appellant's right to use her own property as she sees fit. . . . Long before the original States adopted the Constitution, the common law protected an owner's right to decide how best to use his own property.

Id. at 512.

Justice Stevens' opinion underscored the importance to a property owner deciding just who will reside in his property:

> Since this ordinance has not been shown to have any "substantial relation to the public health, safety, morals, or general welfare" of the city of East Cleveland, and since it cuts so deeply into a fundamental right normally associated with the ownership of residential property -- that of an owner to decide who

> may reside on his or her property -- it must fall under the limited standard of review of zoning decisions which this court preserved in *Euclid* and *Nectow*.

Id. at 520.

Thus, the state certainly could not force the Petitioner to live with her grandchildren, or without her grandchildren -- or even to live with an unmarried couple -- in her own house. But the unanswered question, however, is: may the state force her to allow such persons to occupy her property against her will if she does not reside on the premises? In other words, is the "fundamental right of property ownership to decide who may reside in the property -- or whom she may exclude from the property -- extinguished when the property is put up for rent. *Amicus curiae* urges this Court to grant the Petition and resolve this important constitutional issue.

SUMMARY OF ARGUMENT

Fortunately for property owners, this Court has never taken such a cavalier attitude toward fundamental property rights as to hold that the lessor relinquishes the right to exclude when the property is made available for rent (as might be suggested by *Yee v. City of Escondido, California,* 503 U.S.

519 (1992)). To the contrary, in a variety of circumstances, this Court has staunchly upheld the rights of property owners to exclude others from their property even in situations where the intrusion is *de minimus*. *Loretto*, 458 U.S. 419, 438 (1982)(even *de minimus* invasions of private property trigger the protections of the Fifth Amendment.)

Moreover, this Court has repeatedly held that the deprivation of a fundamental property right constitutes a *per se* violation of the Fifth Amendment unless just compensation is paid to the owner. *See, e.g., Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). Describing the incidents of property ownership as a "bundle of sticks," this Court has cautioned that "the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety." *Andrus v. Allard*, 444 U.S. 51, 66 (1979). But, a regulation or statute which deprives the property owner of a fundamental aspect of private property ownership can be a *per se* unconstitutional taking. For example, Native Americans who were deprived of the "right to pass on property -- to one's family in particular -- [which] has been part of the Anglo-American legal system since feudal times" so

impairs this bundle of rights as to constitute an invalid taking, without just compensation. *Hodel v. Irving*, 481 U.S. 704, 717 (1987).

Likewise, this Court has held on numerous occasions that the right to exclude others from one's property is such a fundamental right of private property ownership that its destruction (without payment of just compensation) is also a *per se* violation of the Fifth Amendment. *See, e.g., Loretto v. TelePrompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *see also International News Serv. v. Associated Press*, 248 U.S. 215, 250 (1918)("An essential element of individual property is the legal right to exclude others from enjoying it.")(J. Brandeis)(dissenting opinion).

On the other hand, this Court has held that the right of unmarried individuals to live together is not a constitutionally protected right. *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974). Indeed, as the concurring and dissenting opinion below of Justice Kennard points out, even the State of California discriminates against unmarried couples who want

to live together in some of its own public housing programs. (A.14a).[2]

Moreover, other courts have also questioned whether the purpose of the statute at issue in this case -- which is designed to eliminate housing discrimination against unmarried heterosexual couples -- is even a legitimate governmental interest. *See, e.g., Attorney General v. Desilets,* 418 Mass. 316, 327, 636 N.E.2d 233, 239 (1993); *State by Cooper v. French,* 460 N.W.2d 2, 10 (Minn. 1990); *see also Swanner v. Anchorage Equal Rights Commission,* 115 S. Ct. 460, 461 (1994).

Justice Kennard points out the lack of any "problem" for which the statute at issue purports to provide a "solution".

> California authorities are arguing . . . that states have a compelling interest in forcing conscientiously objecting landlords to rent apartments to unmarried couples. [They do not] mention [] any evidence that unmarried couples were actually having difficulty finding housing; without such evidence, this claim of compelling interest is utterly frivolous.

Laycock & Thomas, *Interpreting the Religious Freedom Restoration Act,* 73 Tex.L.Rev. 209, 223-224 (1994).

---

[2] Reference to the Petitioner's Appendix to Petition for Writ of Certiorari

In short, the Petitioner in this case has had her constitutional right to exclude others from her property extinguished through application of the state's law forbidding her to exclude unmarried, heterosexual couples from her premises. No compensation has been paid to her for her loss of this fundamental property right. Moreover, the state has offered no compelling interest to justify the infringement on her constitutionally protected property rights. Thus, unless this Court decides that a property owner 's right to exclude others is modified or extinguished when the property is rented (or that unmarried heterosexual couples are a protected class), the decision of the court below should be summarily reversed. Or, alternatively, the Petition for a Writ of Certiorari should be granted so that this Court can clarify the nature of the right to exclude others in the context of private property that has been rented.

REASONS WHY THE PETITION SHOULD BE GRANTED

I. THE RIGHT TO EXCLUDE OTHERS FROM ONE'S PROPERTY IS ONE OF THE MOST FUNDAMENTAL ASPECTS OF PRIVATE PROPERTY OWNERSHIP.

The right to make reasonable use of one's property is protected by the Fifth Amendment's Just Compensation clause. *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003 (1992). More specifically, the property rights in land have been described as the right "to possess, use, and dispose of it." *Loretto v. TelePrompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982), *quoting from United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945). As Justice Marshall explained in *Loretto*:

> [T]he property owner has no right to possess the occupied space himself, and also has no power to exclude the occupier from possession and use of the space. The right to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights.

Id. at 435.

As this Court has repeatedly held: "a physical intrusion by government [is] a property restriction of an

unusually serious character for purposes of the Takings Clause. . . . In such a case, 'the character of the government action' not only is an important fact in resolving whether the action works a taking but also is determinative." *Loretto*, 458 U.S. at 426; *see also United States v. Causby*, 328 U.S. 256 (1946)(loss of ability to exclude others from privately owned airspace violated the Fifth Amendment).

In *Hodel v. Irving*, 481 U.S. 704, 716 (1987), this Court noted in the context of [a case involving the right of Indians to devise] that "one of the most essential sticks in the bundle of rights that are commonly characterized as property -- is the right to exclude others."

Likewise, in *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), this Court held that government imposition of a navigational servitude requiring public access to a privately owned pond was an unconstitutional taking. The Court emphasized that the servitude took the landowner's right to exclude, "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Id.* at 176.

The statute at issue here deprives plaintiff of the right to exclude unwanted persons from her private property. The only question is whether that deprivation (without compensation) is rendered "constitutional" by virtue of the fact that she leases the property. This Court should grant the Petition for Certiorari to resolve this issue.

II. IN SHARP CONTRAST, THERE IS NO CONSTITUTIONAL RIGHT OF UNMARRIED PERSONS TO LIVE TOGETHER.

In *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974), this Court was faced with a city ordinance that restricted land use to one-family dwellings, and defined the word "family" to mean one or more persons related by blood, adoption, or marriage, or not more than two unrelated persons, living, and cooking together as a single housekeeping unit. Justice Douglas, writing for the Court, upheld the validity of the ordinance, explaining that there is no constitutional right of unrelated persons to live together:

> It involves no "fundamental" right guaranteed by the Constitution, such as voting; the right of association; the right of access to the courts; or any rights of privacy. We deal with economic

> and social legislation where legislatures have historically drawn lines . . .

Id. at 7.

In *Village of Belle Terre,* the community had decided that precluding non-related individuals from living together would allow neighborhoods to maintain a more peaceful, less crowded, family-oriented atmosphere. Thus, this Court upheld the validity of the challenged ordinance as a rational means to achieve a legitimate public purpose:

> A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. This goal is a permissible one within *Berman v. Parker, supra.* The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.

Id. at 9.

Not only has this Court upheld the discrimination against unmarried, heterosexual persons living together, discrimination against such persons is sanctioned in a variety of contexts by all levels of government as a rational means to achieve a legitimate governmental purpose. For example, as Justice Kennard in his concurring and dissenting opinion to

the majority opinion below pointed out, even the State of California "has authorized both public and private universities to discriminate in housing on the basis of marital status, permitting them to offer housing reserved for married students." (A.94a).

Likewise, the federal government typically limits retirement benefits, social security benefits, tax credit benefits, and other similar benefits to married couples -- and denies them to individuals who are not related. Similarly, our Armed Forces typically provide "married" housing units and "bachelor's" quarters, often located in separate areas on military bases.

The State of California may well be right that prohibiting housing discrimination against unmarried, heterosexual couples is a good idea, but since the right of unmarried persons to live together is not a constitutionally protected right, the state is not free to abridge constitutionally protected property rights to achieve that objective. Indeed, as Justice Oliver Wendall Holmes warned back in 1922: "[A] strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than

the constitutional way of paying for the change."

Pennsylvania Coal v. Mahon, 260 U.S. 393, 416 (1922).

III. EXTINGUISHING THE RIGHT OF A PROPERTY OWNER TO EXCLUDE OTHERS FROM HER PROPERTY WITHOUT PAYMENT OF JUST COMPENSATION VIOLATES THE FIFTH AMENDMENT.

A holding by this Court that the right to exclude others from one's property is extinguished by renting the property would fly in the face of decades of this Court's jurisprudence. For example, in *Dolan v. City of Tigard,* 114 S. Ct. 2309 (1994), the owner of a commercial plumbing supply store was required to grant approximately ten percent of her property to the City for a public bicycle/pedestrian pathway in exchange for a building permit to enlarge her store. Mrs. Dolan refused, arguing that she had no desire to open up her property to the public at large, even though she clearly had invited the public to shop at her store. This Court upheld her right to exclude the public from her property, and held that in order to condition a permit requirement upon the granting of an easement for public

access the city must demonstrate that there is a rough proportionality between the burden imposed by the development and the requirement.

Likewise, in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), this Court invalidated a requirement that an easement for public ingress and egress along the beach be donated as a condition of permitting reconstruction of a beach house -- thereby resulting in the loss of their ability to exclude others from the property. This Court found such a requirement unconstitutional because the condition did not substantially advance its avowed purpose, and also abridged constitutionally protected property rights. As this Court observed: "[T]he Commission may well be right that [public access] is a good idea, but that does not establish that the Nollans (and other coastal residents) alone can be compelled to contribute to its realization." *Id.* at 841.

There is no suggestion whatsoever in the *Nollan* decision that had the Nollans owned the property as a rental unit, that the state would then be free to condition the building permit application upon the Nollans giving up their right to exclude others from their property. Nevertheless, if the

decision below were the law of the land, that would indeed be the logical outcome of the *Nollan* case.

Finally, in *Kaiser Aetna v. United States,* 444 U.S. 164 (1979), the owners of a private lagoon had invested millions of dollars to transform a pond into a marina community servicing the 20,000 persons around the pond. To create the marina required dredging a channel connecting the Kuapa Pond to a bay and the Pacific Ocean. Nevertheless, the marina owners still maintained control over who could enter their pond. The government asserted that connecting Kuapa Pond to the ocean ("navigable waters of the United States ") transformed the pond into public property. This Court rejected that argument even though clearly the privately owned property was open to any member of the public willing to paying the annual $72 membership fee:

> In this case, we hold that the "right to exclude," so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation. . . . Thus, if the Government wishes to make what was formerly Kuapa Ponds into a public aquatic park . . . it may not, without invoking its eminent domain power and paying just compensation, require them to allow free access to the dredge pond

> while petitioners' agreement with their customers calls for an annual $72 regular fee.

Id. at 180; *see also Moore v. City of East Cleveland,* 431 U.S. 494 (1977)("we are satisfied that the remedy here adopted constitutes a sweepingly excessive restriction of property rights as against the problem sought to be dealt with, and in legal contemplation deprives plaintiffs of their property without due process.")

In the instant case, Petitioner's agreement with her customers (lessees) require not only that they pay rent, but that they be a legally married couple. If the state of California wants to deprive petitioner of the right to exclude unmarried heterosexual couples, preserved by that agreement, then it must exercise its power of eminent domain and achieve its objective by no less than "the constitutional way of paying for the change." *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 416 (1922). Otherwise, the state cannot simply take Petitioner's right to exclude others from her property without paying her compensation, violating the Just Compensation Clause.

CONCLUSION

For all of the foregoing reasons *amicus curiae* hereby respectfully urge this Court to grant the petition for a Writ of Certiorari and resolve these significant constitutional issues.

Respectfully submitted,

Nancie G. Marzulla
Barry C. Hodge
DEFENDERS OF
PROPERTY RIGHTS
6235 33rd Street, NW
Washington, DC 20015-2405
202-686-4197

August 7, 1996

(6)

Supreme Court, U.S.
FILED
AUG 20 1996
CLERK

No. 96-31

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

EVELYN SMITH,

Petitioner,

v.

FAIR EMPLOYMENT AND HOUSING COMMISSION, KENNETH PHILLIPS, AND GAIL RANDALL,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of California

REPLY TO BRIEF IN OPPOSITION

WENDELL R. BIRD
BIRD & MYERS
1150 Monarch Plaza
3414 Peachtree Road, NE
Atlanta, Georgia 30326
(404) 264-9400

JORDAN W. LORENCE*
CIMRON CAMPBELL
JANE E. HADRO
MARK N. TROOBNICK
Box 2074
Fairfax, Virginia 22031
(703) 359-8619

**Counsel of Record*

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. 1-800-347-8208

15 pp

TABLE OF CONTENTS

I. THIS COURT SHOULD REVERSE THE CALIFORNIA SUPREME COURT'S DECISION BECAUSE IT REMOVES PROTECTION FOR MOST PEOPLE UNDER RFRA AND THE FREE EXERCISE CLAUSE WITH ITS EXTREME INTERPRETATION OF "SUBSTANTIAL BURDEN" 1

II. THE CALIFORNIA SUPREME COURT'S DECISION CONFLICTS WITH DECISIONS OF THREE OTHER STATE SUPREME COURTS 2

III. THE CALIFORNIA SUPREME COURT'S DECISION CONFLICTS WITH EIGHT FEDERAL APPEALS COURT DECISIONS INTERPRETING RFRA 4

IV. THIS COURT SHOULD REVIEW THE "COMPELLING STATE INTERESTS" RAISED BY THE RESPONDENTS 6

A. This Court Should Reject Anew The Respondents' Argument that Free Exercise Exemptions Violate the Establishment Clause. 6

B. This Court Should Grant Review and Rule That "Eradicating All Forms of Discrimination" Is Not a Proper Compelling State Interest 7

C. This Court Should Grant Review and Rule That State Constitutional Rights Do Not Override Mrs. Smith's Rights Under RFRA and the Free Exercise Clause. 9

V. THE SIGN-POSTING REQUIREMENT IS PROPERLY BEFORE THIS COURT 9

VI. THE PROPERTY RIGHTS ISSUES ARE PROPERLY PRESENTED TO THIS COURT 10

CONCLUSION 10

TABLE OF AUTHORITIES

Cases:

Attorney General v. Desilets,
418 Mass. 316, 636 N.E.2d 233 (1994) 3

Board of Education of Kiryas Joel v. Grumet,
129 L.Ed.2d 546 (1994) 6

Carroll v. Princess Anne,
393 U.S. 175 (1968) 10

Cleburne v. Cleburne Living Center,
473 U.S. 432 (1985) 6

Garnett v. Renton, Washington School District,
987 F.2d 642 (9th Cir. 1993) 9

Hobbie v. Unemployment Appeals Commission of Florida,
480 U.S. 136 (1987) 6

Lynch v. Donnelly,
465 U.S. 668 (1984) 6

Mack v. O'Leary,
80 F.3d 1175 (7th Cir. 1996) 4, 5

Sherbert v. Verner,
374 U.S. 398 (1963) 1, 2

State ex rel. Cooper v. French,
460 N.W.2d 2 (1990) 4

Swanner v. Anchorage Equal Rights Commission,
874 P.2d 274 (1994) 3

Swanner v. Anchorage Equal Rights Commission,
130 L.Ed.2d 369 (1994) 3

Widmar v. Vincent,
454 U.S. 264 (1981) 9

Constitution and Statutory Authorities:

First Amendment, Free Exercise Clause . . . . . passim

Religious Freedom Restoration Act of 1993
42 U.S.C. §2000bb . . . . . passim

California Government Code §12995(2) 8

I. THIS COURT SHOULD REVERSE THE CALIFORNIA SUPREME COURT'S DECISION BECAUSE IT REMOVES PROTECTION FOR MOST PEOPLE UNDER RFRA AND THE FREE EXERCISE CLAUSE WITH ITS EXTREME INTERPRETATION OF "SUBSTANTIAL BURDEN."

The California Supreme Court's harsh and unprecedented interpretation of what constitutes a "substantial burden" under the Religious Freedom Restoration Act (RFRA) and the Free Exercise Clause eliminates protection for religious liberties under these two provisions for most Californians. Under the reasoning of the California Supreme Court, if the religious person can do anything to remove herself from the situation -- such as selling her four town homes and permanently abandoning her occupation as a landlord -- there is no "substantial burden" on her religious liberties.

The California Supreme Court's decision means that no matter what onerous penalty the Fair Employment and Housing Commission imposed on Mrs. Smith, she could not suffer a "substantial burden" under RFRA or the Free Exercise Clause because she could sell her property, pay capital gains taxes and stop earning her income as a landlord. This reasoning ignores this Court's decisions interpreting the Free Exercise Clause which Congress relied upon in drafting RFRA. See 42 U.S.C. §2000bb(b). Further, the California Supreme Court's decision really speaks to what Mrs. Smith might have done in the past to avoid this litigation, but the decision ignores the fact that Mrs. Smith can do nothing now to remove the Commission's penalties already imposed on her. She is burdened now.

This Court has ruled that government action forcing a person to choose between her religious beliefs and her livelihood is a substantial burden on their rights under the Free Exercise Clause, *Sherbert v. Verner*, 374 U.S. 398, 404 (1963). This Court said that when the government forces someone to choose between their livelihood and their religious beliefs, the

government "puts the same kind of burden upon the free exercise of religion as would a fine against her for ... [religious] worship." *Id.* Congress specifically adopted this *Sherbert* standard to determine whether a "substantial burden" exists under RFRA. *See* 42 U.S.C. §2000bb(b).

The Commission challenges Mrs. Smith's factual assertion that she earns her livelihood by renting her four town homes. However, she testified at the administrative hearing:

> Q: When you say a source of income is your duplexes, would explain that please?
>
> Mrs. Smith: The income from my duplexes is my main source of income.

Hearing Transcript, Vol. II; page 52. This Court should grant review and reverse the California Supreme Court's extreme interpretation of what constitutes a substantial burden under RFRA and the Free Exercise Clause. That action would restore protection under RFRA and the Free Exercise Clause now made inaccessible to most Californians by their high court.

II. THE CALIFORNIA SUPREME COURT'S DECISION CONFLICTS WITH DECISIONS OF THREE OTHER STATE SUPREME COURTS.

The respondents argue that the California Supreme Court's decision does not conflict with the three state supreme court decisions from Massachusetts, Alaska and Minnesota involving landlords claiming religious exemptions from prosecution for refusing to rent to unmarried couples. California's decision conflicts with those of the other three state supreme courts on the issue of substantial burden. Justice Clarence Thomas stated, "there is no doubt that these decisions applied the *Sherbert*-

Yoder test adopted by RFRA," *Swanner v. Anchorage Equal Rights Commission,* 130 L.Ed.2d 369, 370, n. 2 (dissent from denial of certiorari). Each of the three state supreme courts used the compelling state interest test used in RFRA and found that the states' prosecution of the landlords substantially burdened the landlords' religious liberties.

Massachusetts - in *Attorney General v. Desilets*, 418 Mass. 316, 636 N.E.2d 233 (1994), the Massachusetts Supreme Judicial Court applied the state constitution's free exercise clause to a case of two Catholic landlords who refused to rent to a cohabiting couple. That court said that its state free exercise test "appears to be the same as that prescribed by the Religious Freedom Restoration Act of 1993 (42 U.S.C. §2000bb *et seq.*)," 418 Mass. at 322, n.8. The Massachusetts high court said, "[h]ere ... the government has placed a burden on the defendants that makes their exercise of religion more difficult and more costly. The statute affirmatively obliges the defendants to enter into a contract contrary to their religious beliefs and provides significant sanctions for its violation," 418 Mass. at 324. This conflicts with California's decision.

Alaska - In *Swanner v. Anchorage Equal Rights Commission,* 874 P.2d 274 (1994), the Alaska Supreme Court rejected the RFRA claim of a landlord who refused to rent to unmarried couples on the grounds that the state has a compelling state interest in "combating discrimination," 874 P.2d at 280, n. 9. Although the Alaska Supreme Court did not discuss the substantial burden issue under RFRA, a court cannot reach the compelling state interest issue under the language of RFRA unless it first addresses the substantial burden prong. In 42 U.S.C. §2000bb-1(b), RFRA states that "[g]overnment may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person -- (1) is in furtherance of a compelling governmental interest...."

Even the Commission in Mrs. Smith's case concedes that the Alaska Supreme Court assumed that the landlord's rights had been substantially burdened under RFRA: "[u]nlike the Alaska Supreme Court, the California Supreme Court did not assume that the prerequisite for application of RFRA -- that is, a substantial burden -- existed." Commission's Brief at 9.

Minnesota -- In *State ex rel. Cooper v. French*, 460 N.W.2d 2 (1990), the Minnesota Supreme Court ruled 4-3 that the evangelical landlord did not violate the state statute prohibiting marital status discrimination. Six of the seven justices addressed the state free exercise claim, by applying the compelling state interest test used in RFRA. All six found that the landlord's religious liberty rights had been substantially burdened under the compelling state interest test used in RFRA. *See* 460 N.W.2d at 10 and 14-15. They divided 3-3 on whether the state had a compelling interest to justify that substantial burden on the landlord's religious liberties.

The California Supreme Court's ruling conflicts with these three state supreme courts decisions on whether the landlords suffered a substantial burden.

III. THE CALIFORNIA SUPREME COURT'S DECISION CONFLICTS WITH EIGHT FEDERAL APPEALS COURT DECISIONS INTERPRETING RFRA.

Eight federal appeals courts have interpreted RFRA, and the California Supreme Court's decision conflicts with all of them on the issue of substantial burden. Under all of the eight federal appeal courts' tests interpreting RFRA, the state's actions against Mrs. Smith would "substantially burden" her rights under that law. Chief Judge Richard Posner of the Seventh Circuit summarized these various circuit court tests in *Mack v. O'Leary*, 80 F.3d 1175, 1178 (7th Cir. 1996):

> The Fourth, Ninth and Eleventh Circuits define "substantial burden" as one that either compels the religious adherent to engage in conduct that his religion forbids (such as eating pork, for a Muslim or Jew) or forbids him to engage in conduct that his religion requires (such as prayer). *Goodall by Goodall v. Stafford County School Board*, 60 F.3d 168, 172-73 (4th Cir. 1995); *Cheffer v. Reno*, 55 F.3d 1517, 1522 (11th Cir. 1995); *Bryant v. Gomez*, 46 F.3d 948 (9th Cir. 1995) (per curiam). The Eighth and Tenth Circuits use a broader definition -- action that forces religious adherents "to refrain from religiously motivated conduct," *Brown-El v. Harris*, 26 F.3d 68, 70 (8th Cir. 1994), or that "significantly inhibit[s] or constrain[s] conduct or expression that manifests some central tenet of a [person's] individual beliefs," *Werner v. McCotter*, 49 F.3d 1476, 1480 (10th Cir. 1995), imposes a substantial burden on the exercise of the individual's religion. The Sixth Circuit seems to straddle this divide, asking whether the burdened practice is "essential" or "fundamental" *Abdur-Rahman v. Michigan Dept. Of Corrections*, 65 F.3d 489. 491-92 (6th Cir. 1995).

In *Mack*, the Seventh Circuit ruled that a person shows a substantial burden under RFRA when the government "forces adherents of a religion to refrain from religiously motivated conduct, inhibits or constrains conduct or expression that manifests a central tenet of a person's religious beliefs, or compels conduct or expression that is contrary to those beliefs." *Mack*, 80 F.3d at 1179. Under any of these tests used by the eight federal appeals courts, Mrs. Smith suffered a

"substantial burden." The California Supreme Court's interpretation of RFRA is far removed from the center of the debate among the federal appeals courts on what constitutes a substantial burden under RFRA. This Court should grant review and reverse the California Supreme Court's extreme decision on substantial burden.

IV. THIS COURT SHOULD REVIEW THE "COMPELLING STATE INTERESTS" RAISED BY THE RESPONDENTS.

A. This Court Should Reject Anew The Respondents' Argument that Free Exercise Exemptions Violate the Establishment Clause.

The respondents assert that the State has a compelling interest in obeying the Establishment Clause, which they argue they would violate by granting Mrs. Smith a religious liberty exemption. Commission's Brief at 28-30; Cohabiting Couple's Brief at 25-29. They are really arguing that RFRA and the Free Exercise Clause violate the Establishment Clause. The Court of Appeal rejected that argument, App. 178a, n. 13.The California Supreme Court did not address it, App. 41a, n. 21.

This Court should grant review and again reject this extreme Establishment Clause argument as it has done repeatedly in the past. In *Hobbie v. Unemployment Appeals Commission of Florida*, 480 U.S. 136, 144-45 (1987), Justice Brennan wrote for this Court:

> This Court has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause.

This Court also stated this principle at least twice before in *Board of Education of Kiryas Joel v. Grumet,* 129 L.Ed.2d 546 (1994) and *Lynch v. Donnelly,* 465 U.S. 668, 673 (1984).

The respondent's harsh argument would eliminate every statutory or judicial exemption for religious believers, no matter how benevolent or innocuous. This Court should grant review and rule that granting exemptions under RFRA or the Free Exercise Clause do not violate the Establishment Clause.

B. This Court Should Grant Review and Rule That "Eradicating All Forms of Discrimination" Is Not a Proper Compelling State Interest.

The respondents claim that they have a compelling state interest in eradicating all forms of discrimination by business establishments, in providing equal opportunity and in protecting personal dignity. Commission Brief at 24-27; Cohabiting Couple's Brief at 25-27. The respondents try to characterize Mrs. Smith's refusal to rent to the unmarried couple as a morally evil act akin to an act of racial discrimination. *Id.*

This Court should grant review and rule that in this case the state cannot lump Mrs. Smith's actions against the cohabiting couple together with reprehensible acts of racism and then assert a generalized compelling state interest in eradicating all forms of discrimination to justify its actions against Mrs. Smith. The respondents may not argue that because racial discrimination is bad, so are Mrs. Smith's actions in this case. Combating marital status discrimination does not rise to the same moral or constitutional level as eradicating racial discrimination. This Court ruled that the government's interest in eliminating a classification of discrimination under the Equal Protection Clause varies

depending on the specific classification in question. *See Cleburne v. Cleburne Living Center,* 473 U.S. 432 (1985). Mrs. Smith testified that she refuses to rent to smokers and pet owners. Hearing Transcript, Vol. II, pp. 53-4. Does the state have a compelling state interest to punish Mrs. Smith for those types of "invidious discrimination" as well?

The state undermines its claimed compelling state interest to protect unmarried couples because the state fair housing law exempts all state and private universities and colleges in California from the provisions banning marital status discrimination by permitting married student housing and single sex dorms. California Government Code §12995(2).

Gail Randall, the female unmarried cohabitant in this case, was a student at Chico State University at the time of incidents triggering this case. App. 199a. If Mrs. Smith had earned her livelihood by working as the housing director at Chico State, she could have legally refused to rent campus housing to Gail Randall and her unmarried partner. In fact, all 19 state universities in California at the time of the trial had rules prohibiting unmarried couples from rooming together in campus housing. Hearing Transcript Vol. II, p. 124. In spite of that fact, the state now prosecutes Mrs. Smith for doing the very thing that the state does as a landlord.

Also, California courts and the California Legislature have repeatedly refused to grant unmarried couples the same legal rights as married couples. App. 139a-140a. California does not uniformly enforce this supposed compelling state interest. This Court should grant review and reject the overbroad statement of the compelling state interest as "eradicating all forms of discrimination," and rule that the real state interest in this case of protecting the housing of cohabiting couples is not compelling for religious liberties purposes.

C. This Court Should Grant Review and Rule That State Constitutional Rights Do Not Override Mrs. Smith's Rights Under RFRA and the Free Exercise Clause.

The respondents argue that the State has a compelling state interest in protecting the unmarried couples' state constitutional right to privacy about matters of sexual intimacy. The Court of Appeals rejected this argument, 188a-191a. The California Supreme Court did not address this issue. App. 9a and 16a.

This Court should grant review and rule again that a state constitutional right cannot trump a federal constitutional right, *Widmar v. Vincent,* 454 U.S. 264, 276 (1981), or a federal statutory right, such as RFRA. *Garnett v. Renton, Washington School District,* 987 F.2d 642, 646 (9th Cir. 1993).

V. THE SIGN-POSTING REQUIREMENT IS PROPERLY BEFORE THIS COURT.

The respondents argue that the sign-posting requirement is no longer in this case because the Commission voluntarily withdrew that punishment at the California Court of Appeal. However, the California Court of Appeal refused to allow the Commission to withdraw that requirement. The Court of Appeal criticized the Commission's efforts because they were intended "to foreclose review of [the Commission's] 'usual remedial practice' under the heightened standard applicable to "hybrid" cases as explained in *Smith.*" App. 170a, n.9.

The California Supreme Court declined to rule on this issue. App. 24a, n. 15. This Court should not allow the Commission to avoid judicial review of its sign-posting requirement by unilaterally pulling the requirement out of the case when the

Commission thinks the requirement may be struck down. The Commission's sign-posting requirement is therefore "capable of repetition, yet evading review," *Carroll v. Princess Anne*, 393 U.S. 175, 178-79 (1968).

VI. The Property Rights Issues are Properly Presented to This Court.

The California Supreme Court ruled that Mrs. Smith suffered no burden on her religious freedom because she could simply sell her four townhouses and permanently abandon her occupation as a landlord. App. 32a and 40a. Because the government forces Mrs. Smith to sell her land or violate her religious convictions, Mrs. Smith properly asserts a hybrid claim of free exercise rights combined with federal property rights. With its ruling, the California Supreme Court placed these federal Takings issues front and center in this case.

CONCLUSION

For these reasons, petitioner Evelyn Smith asks this Court to grant the petition for writ of certiorari.

Respectfully submitted,

WENDELL R. BIRD
BIRD & MYERS
1150 Monarch Plaza
3414 Peachtree Rd. NE
Atlanta, Georgia 30326
(404) 264-9400

JORDAN W. LORENCE*
CIMRON CAMPBELL
JANE E. HADRO
MARK N. TROOBNICK
Box 2074
Fairfax, Virginia 22031
(703) 359-8619
*Counsel of Record

August 20, 1996

MOTION FILED

AUG 5 1996

(6)

No. 96-31

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

EVELYN SMITH,

Petitioner,

—v.—

FAIR EMPLOYMENT AND HOUSING COMMISSION, KENNETH PHILLIPS and GAIL RANDALL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF THE AMERICAN JEWISH CONGRESS, BAPTIST JOINT COMMITTEE ON PUBLIC AFFAIRS, CHRISTIAN LEGAL SOCIETY, CHRISTIAN MEDICAL AND DENTAL SOCIETY, CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, NATIONAL ASSOCIATION OF EVANGELICALS, NATIONAL COUNCIL OF THE CHURCHES OF CHRIST IN THE U.S.A., THE SOUTHERN BAPTIST CONVENTION–CHRISTIAN LIFE COMMISSION AND THE UNION OF AMERICAN HEBREW CONGREGATIONS IN SUPPORT OF THE PETITION FOR CERTIORARI

MARC D. STERN
Counsel of Record
FRED BLUM
AMERICAN JEWISH CONGRESS
15 East 84th Street
New York, New York 10028
(212) 360-1545

DOUGLAS LAYCOCK
Of Counsel

53 pp

No. 96-31

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

EVELYN SMITH,

Petitioner,

v.

FAIR EMPLOYMENT AND HOUSING COMMISSION, KENNETH PHILLIPS, AND GAIL RANDALL,

Respondents.

On Petition for Writ of Certiorari
to the Supreme Court of California

MOTION FOR LEAVE TO BRIEF *AMICI CURIAE OF* THE AMERICAN JEWISH CONGRESS, *ET AL.*

The American Jewish Congress, Baptist Joint Committee on Public Affairs, Christian Legal Society, Christian Medical & Dental Society, Church of Jesus Christ of Latter-day Saints, National Association of Evangelicals, National Council of the Churches of Christ in the U.S.A., Southern Baptist Convention-Christian Life Commission and the Union of American Hebrew Congregations respectfully move for an order permitting

them to file the attached brief *amici curiae*. The Petitioner consented to movants' request for leave to file. Respondents have not responded to that request.

Each of the *amici* represents thousands of religious believers whose rights under the Religious Freedom Restoration Act are adversely affected by the judgment below. In the instant brief they demonstrate that the language, intent, and legislative history of RFRA all mandate a reversal of the judgment below that Evelyn Smith was not burdened by a law requiring her to rent her property to an unmarried couple.

Marc D. Stern
Counsel of Record
Fred Blum
American Jewish Congress
15 East 84th Street
New York, New York 10028
(212) 360-1545

August 2, 1996

No. 96-31

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

EVELYN SMITH,

Petitioner,

v.

FAIR EMPLOYMENT AND HOUSING COMMISSION, KENNETH PHILLIPS, AND GAIL RANDALL,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of California

BRIEF *AMICI CURIAE OF*

The American Jewish Congress, Baptist Joint Committee on Public Affairs, Christian Legal Society, Christian Medical & Dental Society, Church of Jesus Christ of Latter-day Saints, National Association of Evangelicals, National Council of the Churches of Christ in the U.S.A., Southern Baptist Convention-Christian Life Commission and the Union of American Hebrew Congregations

IN SUPPORT OF THE PETITION FOR CERTIORARI

MARC D. STERN
Counsel of Record
AMERICAN JEWISH CONGRESS
15 East 84th Street
New York, New York 10028
(212) 360-1545

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF THE *AMICI* 1

ARGUMENT 7

I. PETITIONER ESTABLISHED A BURDEN WITHIN THE MEANING OF RFRA 7

A. The Decision Below Defies The Plain And Literal Meaning Of the Statute 8

B. The Pre-*Smith* Case Law Indicates That Mrs. Smith Has Been Substantially Burdened 11

C. The Legislative History Demonstrates That Mrs. Smith Was Burdened 16

II. A BURDEN TO THIRD PARTIES DOES NOT OBVIATE THE EXISTENCE OF A SUBSTANTIAL BURDEN ON A CLAIMANT 22

CONCLUSION 23

TABLE OF AUTHORITIES

CASES

44 Liquormart, Inc. v. Rhode Island, 116 S.Ct 1495 (1996) 11

Attorney General v. Desilets, 418 Mass. 316, 636 N.E.2d 233 (1994) 16

Bowen v. Roy, 476 U.S. 673 (1986) 20

Braunfield v. Braun, 336 U.S. 599 (1961) 13

Bryant v. Gomez, 46 F.3d 948 (9th Cir. 1995) 21

Corp. of Presiding Bishop v. Amos, 483 U.S. 327 (1987) 22

Delaney v. Super. Ct., 50 Cal.3d 785, 268 Cal.Rptr. 753, 789 P.2d 934 (1990) 11

EEOC v. Townley Engineering and Mfg. Co., 859 F.2d 610 (9th Cir. 1988) 15

Employment Division v. Smith, 494 U.S. 872 (1990) 11, 15, 17

Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985). 22

Grosz v. City of Miami Beach, 82 F.3d 1005 (11th Cir. 1996) 16

In Re Willam, 1996 W.L. 418712 (1996) 11

Jimmy Swaggert Ministries v. Bd. of Equalization, 493 U.S. 378 (1990) 13

John v. Donahue, 2 Cal.Rptr.2d 32 (Ct. App. 2d Dist. 1991) 17

Lyng v. Northwest Indian Cemetery Protective Association, 485 U.S. 439 (1987) 20

Mack v. O'Leary, 80 F.3d 1175 (7th Cir. 1996) 21

NY Times v. Sullivan, 376 U.S. 254 (1964) 11

Sherbert v. Verner, 374 U.S. 398 (1963) . . . . . *passim*

St. Agnes Hospital v. Riddick, 748 F.Supp. 319 (D. Md.1990) 18

State by Cooper v. French, 460 N.W.2d 2 (Minn. 1990) 16, 17

Swanner v. Anchorage Equal Rights Commission, 874 P.2d 274 (Alaska), cert. denied, 115 S.Ct. 460 (1994) 16

Tony and Susan Alamo Foundation v. Secretary of Labor, 471 U.S. 290 (1985) 14, 15

Wisconsin v. Yoder, 406 U.S. 205 (1971) 17

LEGISLATIVE HISTORY

CONG.REC. S14352 (October 26, 1993) 19

CONG.REC. S14365 (October 26, 1993) 20

D.M. Ackerman, The Religious Freedom Restoration Act of 1993: A Legal Analysis (1992) 17

H.R.REP. 103-88 (103rd Cong. 1st Sess.) 17-19

Hearings Before the Senate Comm. on the Judiciary, on S.2969, 102nd Cong., 2d Sess. (1992) 18

Religious Freedom Restoration Act of 1990: Hearings Before the Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary, U.S. House of Representatives, on H.R. 2797, 102nd Cong., 2d Sess. (1992) 17

Religious Freedom Restoration Act, 42 U.S.C. § 2000bb, *et seq.* . . . . . *passim*

S.REP. 103-111 at pp. (103rd Cong., 1st Sess.) . 11, 13, 16

OTHER AUTHORITIES

American Heritage Dictionary (2d College ed. 1982) . 8

R. Wuthnow, The Restructuring of American Religion (1988) 21

Roget's International Thesaurus (3rd ed. 1962) 8

INTEREST OF THE *AMICI*

The organizations filing this brief likely disagree on the question of whether the Religious Freedom Restoration Act ("RFRA") ultimately protects a landlord from refusing to rent apartments to unmarried couples. That is to say, they disagree about whether a state's ban on such discrimination furthers a narrowly drawn compelling interest.

These organizations are all agreed, however, that the holding of the California Supreme Court that landlord Evelyn Smith had not crossed the RFRA threshold of establishing the existence of a "substantial burden" on her religious practice, 42 U.S.C. § 2000bb, because she could earn a living in some other way, is unsustainable and inconsistent with the language, intent and legislative history of the Act. Because the general adoption of a reading so limiting RFRA would frustrate an Act of Congress of utmost importance to millions of Americans, the judgment merits review by this Court.

***

The American Jewish Congress is an organization of American Jews founded in 1918 to protect the civil, political, economic and religious rights of American Jews and all Americans. It has long fought against all forms of discrimination, including housing discrimination. It has also taken a particular interest in the Establishment and Free Exercise clauses, because in its view, these clauses

are indispensable safeguards for the religious liberty of American Jews.

***

The Baptist Joint Committee on Public Affairs is composed of representatives from various cooperating Baptist conventions and conferences in the United States. It deals exclusively with issues pertaining to religious liberty and church-state separation and believes that vigorous enforcement of both the Establishment and Free Exercise clauses is essential to ensure the religious liberty of all Americans.

The Baptist Joint Committee's supporting bodies include: Alliance of Baptists; American Baptist Churches in the U.S.A.; Baptist General Conference; Cooperative Baptist Fellowship; National Baptist Convention of America; National Baptist Convention, U.S.A., Inc; National Missionary Baptist Convention; North American Baptist Conference; Progressive National Baptist Convention, Inc.; Religious Liberty Council; Seventh Day Baptist General Conference; and Southern Baptists through various state conventions and churches.

Because of the congregational autonomy of individual Baptist churches, the Baptist Joint Committee does not purport to speak for all Baptists.

***

The Christian Legal Society (CLS) is a national association of over 4,500 attorneys, law students and judges. Through its local membership and its Center for Law and Religious Freedom in Annandale, Virginia, CLS is committed to the protection of religious liberties for all citizens of the United States, regardless of religious background. Since 1976, CLS has written numerous *amicus* briefs to the U.S. Supreme Court and others to ensure that the high standard of protection granted religious free exercise in the U.S. and state constitutions continues.

***

Founded in 1931, the Christian Medical & Dental Society (CMDS) today represents over 11,000 members–primarily practicing physicians representing the entire range of medical specialties. These members share a common commitment to the principles of biblical faith and the integration of these principles with professional practice.

We view such principles as essential to protecting the lives and best interests of our patients, our conscientious practice of medicine according to long-standing Hippocratic and religious principles, and to preserving the public respect accorded to physicians as guardians of health and life. The freedom to exercise these convictions in the practice of medicine and

dentistry—both in treatment of patients and as managers of private practices—is vital to each of our members.

***

The Church of Jesus Christ of Latter-day Saints is an unincorporated religious association headquartered in Salt Lake City, Utah. Church membership exceeds 9.5 million with more than 20,000 congregations located throughout the world. Firmly embedded in the tradition and teachings of the LDS Church are the concepts of religious freedom and toleration: "We claim the privilege of worshipping almighty God according to the dictates of our own conscience and allow all men the same privilege, let them worship how, where, or what they may." Article of Faith, No. 11.

***

The National Association of Evangelicals (NAE) is a non-profit association of evangelical Christian denominations, churches, organizations, and individuals. NAE includes 42,500 churches from 73 denominations, and 295 para-church ministries. Through its commissions and affiliates, such as the World Relief Corporation and the National Religious Broadcasters, NAE serves an evangelical constituency of about 27 million people.

The NAE has joined in many *amicus* briefs in defense of religious freedom, our First Liberty. NAE was an important part of the coalition that labored for passage

of the Religious Freedom Restoration Act. The pinched interpretation of what constitutes a "substantial burden" of the court below threatens to gut RFRA. NAE believes we are our brother's keeper and that a state court should not be allowed, in effect, to disregard a remedial act of Congress enacted pursuant to the Constitution.

***

The National Council of the Churches of Christ in the U.S.A. is a "community of communions" composed of thirty-four national religious bodies—Protestant, Anglican and Orthodox—having an aggregate membership in the United States of over 52,000,000, through which the member bodies work together on a wide range of activities that further Christian unity, witness to their faith and serve people throughout the world. The National Council was one of the early supporters of the legislation that became the Religious Freedom restoration Act, and it strongly presses this effort to persuade the Court to correct the California Supreme Court's misunderstanding of the scope and force of that Act.

***

The Southern Baptist Convention ("SBC") is the nation's largest Protestant denomination, with over 39,900 local churches and 16.5 million members. Christian Life Commission ("CLC") is the public policy and religious liberty agency for the SBC. Southern Baptists have expressed themselves in resolutions adopted in national

conventions over the years regarding the primacy of the principle of religious liberty as contained in the religion clauses of the First Amendment. CLC frequently files briefs as *amicus curiae* in important religious liberty cases such as this one.

***

The Union of American Hebrew Congregations is the synagogue arm of the Reform Jewish movement, representing some 850 congregations and 1.5 million members nationwide. As strong supporters of the Religious Freedom Restoration Act, we believe that the opinion below greatly undermines congressional intent that RFRA be a meaningful check on government intrusion on religious practice. We join this brief with a wide array of other religious organizations to demonstrate, together, the danger the decision below poses to RFRA. We do so mindful of the complexity of the underlying issue, and with the understanding that we will, in nearly every case, find that enforcement of anti-discrimination laws will, in fact, be a compelling state interest.

ARGUMENT

I. PETITIONER ESTABLISHED A BURDEN WITHIN THE MEANING OF RFRA

The notion that a landlord whose faith prohibits her from facilitating out-of-wedlock cohabitation is not "substantially burdened," 42 U.S.C. § 2000bb-1(a) by an order requiring her to do so is, on its face, odd. It is a reading wholly inconsistent with the plain meaning of the Religious Freedom Restoration Act, its purposes and its legislative history. Correcting the narrow interpretation of the court below gave the statutory phrase "substantial burden" is of critical importance, for that decision effectively frustrates enforcement of an act of Congress.

The problem is not just that the court below arguably decided this case in favor of the wrong party. What particularly demands this Court's attention is that the California Supreme Court has taken an act of Congress designed to be a broad statutory charter of liberty and read it grudgingly, as if it were an insignificant administrative regulation or a lifeless, embarrassing and inconvenient relic of some long-ago era.

A. The Decision Below Defies The Plain And Literal Meaning Of the Statute

The dictionary defines a "burden" as something that is difficult to bear.[1] The thesaurus lists, *inter alia*, the following synonyms for "burden": disadvantage, penalty, or impediment.[2] For the landlord whose religion prohibits facilitating sin by allowing her property to be used sinfully, it is surely difficult to bear the state's command that she choose between her livelihood and her faith. Such an official command, backed by fines and the coercive power of the state, is likewise a penalty for implementing a religious practice. The judgment below enforcing the anti-discrimination law in preference to Evelyn Smith's faith-driven practices, at once disadvantages the practitioner of religious beliefs and serves as a significant impediment to their implementation in practice.

The California Supreme Court attempted to avoid RFRA's command that this substantial burden be justified by a compelling interest, 42 U.S.C. § 2000bb-1(b), on the untenable ground that Mrs. Smith was under no religious duty to earn her living as a landlord. It reasoned that since she could choose some other investment with which to support herself, she suffered no impediment to her

---

1. American Heritage Dictionary (2d College ed. 1982).

2. Roget's International Thesaurus (3rd ed. 1962) at p. 483.

religious practice, and was not penalized for her beliefs, when she was told she could not conduct her real estate business consistent with her religious principles. Although it suggested that there might be some cases in which the availability of an alternative way of earning a livelihood would not defeat a burden claim, it did not suggest what rules might define the boundary between those statutes regulating economic activity that did create a burden and those that did not. None readily suggests itself.

Apparently, the court below would have reached the same result had the state insisted that Jehovah's Witness landlords take a religiously objectionable oath, required Amish landlords to paint their houses "worldly colors," forced a Catholic landlord to rent space to an abortion clinic, or compelled Orthodox Jews to let space to Jews for Jesus to mount a campaign to convert Jews to Christianity. If it is inconceivable that these claims would be dismissed on the ground that they presented no substantial burden, no conflict between religion and secular law, it is equally inconceivable to hold that Mrs. Smith was not burdened when she was ordered to conduct her business in ways that conflicted with her faith.

The court below believed that, by abandoning the rental housing business, Mrs. Smith could honor her religious beliefs against facilitating fornication, earn a living, and still abide by the prohibition on discrimination. There being no conflict, in the court's view, there was no need to apply the compelling interest test. The premise of

its decision seems to be that for RFRA purposes, a "substantial burden" exists only if the claimant had no way at all of avoiding the conflict, no matter what price avoidance imposed on the believer.

This construction is plainly wrong. A state which imposes on believers a choice between earning a living and compliance with religious beliefs inevitably creates a "substantial burden," *Sherbert v. Verner*, 374 U.S. 398, 404 (1963). Put otherwise, the state has compelled Evelyn Smith to forfeit the right to be a landlord because of her religious practice, surely a substantial burden on her religious practice.

The business of renting housing is perfectly legal in California. Evelyn Smith might have chosen this profession for any number of reasons—because it is known to her, because it is lucrative, because she already owned rental properties, or because it is neither time-consuming nor physically burdensome. In a free society, people are at liberty to choose their professions without unnecessary governmental interference. Surely, average citizens would think themselves "substantially burdened" if told that their religion was an impediment to participation in a legal enterprise. They might or might not ultimately prevail under RFRA, but they would be substantially burdened, if that language is to be given its ordinary meaning, indeed, if it is to be given any meaning.

RFRA stakes out a broad reach. It provides that it applies to "all federal and state laws." 42 U.S.C. § 2000bb-3(a). The California Supreme Court has inserted a gloss, limiting "all ... laws" to those whose reach cannot be avoided by giving up an otherwise lawful activity or which are engaged in for profit.[3] Had Congress intended such a limit, it would have inserted it.

B. The Pre-*Smith* Case Law Indicates That Mrs. Smith Has Been Substantially Burdened

The meaning of the statute is confirmed by a review of cases predating *Employment Division v. Smith*, 494 U.S. 872 (1990) cases discussing what constitutes a burden on the free exercise of religion. Those cases are properly considered in light of the statutory intent to replicate the law as embodied in *Sherbert*, 42 U.S.C. § 2000bb(b)(1), and the command of the legislative history that courts look to pre-*Employment Division v. Smith* case law as a starting point for statutory interpretation. S.REP. 103-111 at pp. 8-9 (103rd Cong., 1st Sess.) (hereafter "Senate Report").

---

3. By way of comparison, the freedom of the press in both constitutional and statutory forms (*e.g.*, shield laws) is available to those who engage in these activities for financial gain. See, *e.g.*, *44 Liquormart, Inc. v. Rhode Island*, 116 S.Ct 1495 (1996);*NY Times v. Sullivan*, 376 U.S. 254 (1964); *Delaney v. Super. Ct.*, 50 Cal.3d 785, 268 Cal.Rptr. 753, 789 P.2d 934 (1990); *In Re Willam*, 1996 W.L. 418712 (1996) (California's press shield law).

The seminal case on burden is *Sherbert v. Verner*, *supra*. See 42 U.S.C. § 2000bb(b)(1). As is the case here, the conflict in *Sherbert* was purely an economic one. Ms. Sherbert was faced with the choice of giving up her unemployment benefits or accepting Sabbath work. The Court found that the South Carolina statute denying benefits to persons who refused work even for religious reasons coerced Sherbert to abandon her faith:

> The ruling forces [Sherbert] to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.

374 U.S. at 404.

California has confronted Evelyn Smith with exactly the same dilemma. It forced her to choose between an otherwise legal source of income and her religious practice. Since RFRA is modeled on *Sherbert*, it should have been too plain for argument that Mrs. Smith, like Mrs. Sherbert, was burdened by application of a law making her faith and her livelihood irreconcilable.

The California Supreme Court, thought, however, that because Mrs. Smith could support herself with other investments, her situation was not comparable to Sherbert's. That court overlooked the fact that Sherbert too, could have looked for work other than the mill work she knew. She also could have relocated to where she might have found acceptable work. She did not, but that did not affect the result. 374 U.S. at 399, n.2.

The cases the court below relied upon to sustain its ruling that there was no burden on Smith will not bear the weight assigned them. In *Braunfield v. Braun*, 336 U.S. 599 (1961), this Court confronted the claim that a Sunday closing law burdened the religious practices of kosher butcher store operators who closed their stores on Saturday for religion reasons by requiring them to close on Sunday as well. The butchers argued that the law put them at a competitive disadvantage with non-kosher butchers whose religious observances coincided with the mandatory Sunday closings and were able to transact business six, not five, days a week.

This Court found no burden on free exercise. The blue law did not prohibit the practice of Saturday Sabbath observance, but only marginally increased the economic consequences of such observance. For this very reason, the Senate Report accompanying RFRA notes that RFRA would not bar the application of fire codes to churches because such codes did not prohibit or restrain the

religious activity of the church; they merely increased the cost of doing business. Senate Report at 9, n.16.

This Court has likewise found no burden in free exercise challenges to facially neutral tax laws. These taxes (which the Court was careful to note were not the economic equivalent of a prohibition on the religious activity) simply added to the economic cost of doing business, but did not prohibit or otherwise regulate a particular activity. And unlike the sales tax at issue in *Jimmy Swaggert Ministries v. Bd. of Equalization*, 493 U.S. 378 (1990), where the burdens fell in the first instance on purchasers and not the Ministries, the economic burden of the ban on marital status discrimination falls directly on Mrs. Smith.

California has not just made the rental housing business more expensive for Mrs. Smith. It has not just added to her economic cost of doing business. It has made that business wholly incompatible with her religious practices It is as if Maryland ordered kosher butchers to open on Saturday in violation of their religion.

The second case relied on was *Tony and Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290, 303-05 (1985). There a religious foundation challenged the application of the minimum wage laws to its social service program associates. The Foundation did not assert that it had a religious doctrine proscribing payment of the minimum wage. Instead, it argued that its employee-

adherents' religious beliefs prevented them from enriching themselves at the Foundation's expense.

This Court found no burden on the Foundation's (or its associates') religious freedom. It so held not because the associates could find other, non-employment opportunities to serve the Foundation, nor yet because the activity was commercial or because it merely made the conduct of the Foundation's religious activities more expensive. Instead, it held that because the associates could simply return their excess wages to the church and comply fully with their religious beliefs against enriching themselves at the church's expense, there was no impediment at all to the full exercise of the associates' religious beliefs.

In *Alamo* there simply was no clash between the dictates of law and conscience. Both could be satisfied without either yielding to the other. "It is virtually self-evident that the Free Exercise Clause does not require excusal ... unless, at a minimum, [a law] actually burdens freedom." *Id.* at 303. By simply turning over their wages to the church, the associates' religious obligations were met, the Foundation fully complied with the law and the associates could continue their work.

No such cost-free escape is available to Mrs. Smith. She cannot both conduct her business and comply with the dictates of her faith. She cannot rent to unmarried couples

and comply with her religious views forbidding her to do so.

Before *Employment Division v. Smith*, courts confronted various claims that application of anti-discrimination laws to businesses owned by religious proprietors burdened their religious practices in violation of the Free Exercise Clause. These claims always passed the threshold of a substantial burden. Each then proceeded to discuss questions of compelling interest. Thus, for example, the Ninth Circuit found a burden in a case in which an employer had been ordered not to require employees to attend prayer sessions. *EEOC v. Townley Engineering and Mfg. Co.*, 859 F.2d 610 (9th Cir. 1988). Similarly, other courts have found burdens on religious liberty with enforcement of anti-discrimination laws in circumstances similar to those presented here. *State by Cooper v. French*, 460 N.W.2d 2 (Minn. 1990); *Swanner v. Anchorage Equal Rights Commission*, 874 P.2d 274 (Alaska), cert. denied, 115 S.Ct. 460 (1994) (Thomas, J., dissenting from denial of certiorari); *Attorney General v. Desilets*, 418 Mass. 316, 636 N.E.2d 233 (1994).

Congress intended pre-*Smith* free exercise cases to be a general guide to the interpretation of RFRA. Senate Report at 8-9. See *Grosz v. City of Miami Beach*, 82 F.3d 1005, 1007 (11th Cir. 1996). Those cases, coupled with the plain language of the statute, should have led to a different result here.

C. The Legislative History Demonstrates That Mrs. Smith Was Burdened

The idea that religious practice needed broad, wide-ranging and substantial protection in the era of the regulatory state enjoyed such broad and unquestioned support in Congress that the legislative history is sparse. That near-unanimous concern with protecting the believer from thoughtless, needless and cavalier regulation itself cautions against a construction of the statute which would leave the economic lives of citizens beyond its reach. After all, the statute plainly says that it "applies to all Federal and State law." 42 U.S.C. § 2000bb-3(a) [emphasis added], a formulation that includes statutes regulating economic activity. As the House Judiciary Committee explained:

> All governmental actions which have a substantial external impact on the practice of religion would be subject to the restrictions in this bill. ... [I]n order to violate the statute, government need not coerce individuals into violating their religious beliefs ... nor penalize religious activity by denying any person an equal share of the rights, benefits or privileges enjoyed by any

> citizen. Rather, the test applies wherever a law burdens a person's exercise of religion. [emphasis added]

H.R.REP. 103-88 at 6 (103rd Cong. 1st Sess.)

RFRA's supporters called Congress' attention to a number of burdens on religious practice which *Employment Division v. Smith* left wholly unprotected and wholly exempt from the special justification which *Sherbert* and *Wisconsin v. Yoder*, 406 U.S. 205 (1971) required. During the several years in which RFRA was under consideration, several witnesses and the Congressional Research Service pointed out the problem of landlords who would not rent to unmarried couples as exemplifying the type of case which previously was subject to compelling interest analysis and which would be again if RFRA were adopted. D.M. Ackerman, The Religious Freedom Restoration Act of 1993: A Legal Analysis, 26-27 (1992), citing *State by Cooper v. French*, 460 N.W.2d 2 (Minn. 1990); *John v. Donahue*, 2 Cal.Rptr.2d 32 (Ct. App. 2d Dist. 1991); Religious Freedom Restoration Act of 1990: Hearings Before the Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary, U.S. House of Representatives, on H.R. 2797, 102nd Cong., 2d Sess. at 58-59 (1992) (statement of Rep. Kopetski) (hereafter "House Hearings"); Hearings Before the Senate Comm. on the Judiciary, on S.2969, 102nd Cong., 2d Sess. at 54 (1992) (statement of J. Brent Walker) (hereafter "Senate

Hearings"). See also H.R.REP. 103-88, *supra*, at 16, n.6, (defining protection from certain forms of discrimination as compelling interest).

Others mentioned problems which, under the rationale of the court below, would not impose a burden. Witnesses cited *St. Agnes Hospital v. Riddick*, 748 F.Supp. 319 (D. Md. 1990), in which a district court considered a Catholic hospital's expulsion from an obstetrics residency program because it would not permit residents to perform abortions. See, *e.g.*, House Hearings at 157 (statement of Professor Laycock); Senate Hearings at 66 (same). Professor Laycock argued that *Employment Division v. Smith* left such hospitals without recourse. There, too, the hospital and its student doctors could earn their living without obstetrics and gynecology training. And the residents could also go into some other line of work. The judgment below would presumably exclude such cases from the scope of RFRA.

Nothing in the legislative history suggests that these examples, and others like them, were to be excluded from the class of "all Federal and State laws" within the scope of RFRA. This is not surprising because Congress thought it was adopting *Sherbert* standard in statutory form and *Sherbert*, as we have shown, leads ineluctably to the conclusion that Mrs. Smith has been burdened.

To be sure the decision below reflects of the now discredited right-privilege doctrine. But that doctrine was

definitively rejected in *Sherbert*. The House Committee report makes plain that RFRA reached privileges as well as rights, H.R.REP. 103-88, *supra*, p. 6. It defies reason to suppose that a Congress concerned with protecting the practice of religion along the lines of *Sherbert* would revive the right/privilege distinction which that decision discarded.

To be sure, on the Senate floor Senator Hatch moved the addition of the adjective "substantial" to the word "burden", but that change has no relevance here. The amendment was stated by its sponsor not to work any major change in the legislation. The Committee report had consistently referred to RFRA being triggered by a "substantial burden". The change was intended only to bring the bill into conformity with *Sherbert*, which likewise spoke of substantial burdens. CONG.REC. S14352 (October 26, 1993).

What little other evidence there is suggests that the sponsors used the phrase "substantial burden" (a phrase drawn from *Sherbert*) with the intention not of excluding landlords and other commercial entrepreneurs from the scope of RFRA, but of writing out fact patterns on all fours with decisions where the claimant thought to invoke the Free Exercise Clause to restrain internal governmental processes. *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1987); *Bowen v. Roy*, 476 U.S. 673 (1986).

Senator Hatch explained that the amendment was intended only to make the Act conform to the *Sherbert* model, a model we have shown is inconsistent with the decision below:

> RFRA does not effect *Lyng v. Northwest Indian Cemetery Protective Assn.*, a case concerning the use and management of Government resources, because the incidental impact on a religious practice does not constitute a cognizable burden on anyone's free exercise of religion .... [There] the court ruled that the way in which government manages its affairs and uses its own property does not constitute a burden on religious exercise. .... Unless a burden is demonstrated, there can be no free exercise violation. The statutory language in RFRA was drafted to include protection against laws which impose a burden on religious exercise.

CONG.REC. S14365 (October 26, 1993). He continued:

> RFRA would have no effect on cases like *Bowen v. Roy*, involving the use of social security numbers, because the incidental impact on a religious practice does not constitute a cognizable burden on anyone's free exercise of religion. Unless such a

> burden is demonstrated, there can be no free exercise violation. Thus, a claimant never gets to the compelling interest test where there is no burden. RFRA language intentionally includes terminology requiring a burden on one's exercise of religion. [citations omitted]

Id.

The phrase "substantial burden" also implies a command to the courts to weigh the quantum of the burden. Although that command has raised problems of interpretation and application for the courts, compare, *e.g.*, *Mack v. O'Leary*, 80 F.3d 1175 (7th Cir. 1996) with *Bryant v. Gomez*, 46 F.3d 948 (9th Cir. 1995), there can be no question that banning those persons who believe fornication sinful from renting their properties in keeping with their beliefs exceeds any conceivable test of substantial burden. This is particularly so because sexual mores are at the heart of much of contemporary religious debate, as the ongoing disputes in many churches on sexuality issues plainly attests. See R. Wuthnow, The Restructuring of American Religion (1988).

II. A BURDEN TO THIRD PARTIES DOES NOT OBVIATE THE EXISTENCE OF A SUBSTANTIAL BURDEN ON A CLAIMANT

The California Supreme Court also found that Mrs. Smith's religious exercise was not burdened because recognizing a burden on her would "detrimentally affect the rights of third parties." *Amici* readily agree that the fact that a particular accommodation casts a burden on third parties is important to the question of whether there exists a compelling state interest. It is surely relevant to that inquiry to know whether a proposed accommodation will shift heavy burdens to others. Compare *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327 (1987) with *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985). But it is neither logically nor legally relevant to the question of whether Mrs. Smith's exercise of her religion is burdened that Respondents would be burdened if she were accommodated.

If a burden on a third party was an absolute bar to a free exercise claim, *Corporation of the Presiding Bishop v. Amos*, *supra*, was wrongly decided. There, the Court upheld against an Establishment Clause challenge a statute permitting religious organizations to discriminate on the basis of religion in employment. That statute permitted a church to fire an employee who was not in good standing with the church. Rejecting the employee's Establishment Clause challenge to the statutory exemption, this Court

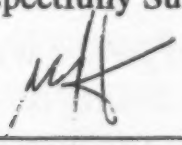
emphasized that it furthered Free Exercise Clause values by removing a burden of government regulation from the church. But on the reasoning of the California court, there could have been no cognizable burden on the church because the exemption burdened others.

CONCLUSION

Amici do not contend that the ultimate resolution of this case is easy. It touches on matters crucial to government, the protection of competing individual liberties and important religious values. Our complaint is precisely that the California Supreme Court made this hard case easy by imposing on RFRA a restriction that is not in the statute. This Court should set the statute free of the constricted reading given it by the California Supreme Court.

The petition for certiorari should be granted

Respectfully Submitted,



Marc D. Stern
Counsel of Record
Fred Blum
American Jewish Congress
15 East 84th Street
New York, New York 10028
(212) 360-1546

August 2, 1996

FILED
JUN 24 1997
OFFICE OF THE CLERK

No. 96-31

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

EVELYN SMITH

Petitioner,

v.

FAIR EMPLOYMENT AND HOUSING COMMISSION, KENNETH PHILLIPS, AND GAIL RANDALL,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of California

SUPPLEMENTAL BRIEF

WENDELL R. BIRD
BIRD & ASSOCIATES
1150 Monarch Plaza
3414 Peachtree Road, NE
Atlanta, Georgia 30326
(404) 264-9400

JORDAN W. LORENCE*
CIMRON CAMPBELL
JANE E. HADRO
MARK N. TROOBNICK
NORTHSTAR LEGAL CENTER
Box 2074
Fairfax, Virginia 22031
(703) 359-8619

**Counsel of Record*

PRESS OF BYRON S. ADAMS ♦ WASHINGTON, D.C. ♦ 1-800-347-8208

9 pp

QUESTIONS PRESENTED

California imposed substantial penalties and a cease-and-desist order on Evelyn Smith, a widow and landlord who earns her living by renting four one-bedroom units that she owns, when she refused to rent to an unmarried couple because of her religious convictions against facilitating fornication.

1. Whether the court below erred in holding that prohibiting and penalizing religiously motivated conduct imposes no substantial burden on the exercise of religion, under the Religious Freedom Restoration Act or the Free Exercise Clause, if people may avoid the penalties by selling their property and permanently abandoning their occupations?

2. Whether a ban on housing discrimination against unmarried couples, as applied to an owner of four rental units who has sincere religious objections to facilitating fornication, serves a compelling interest by the least restrictive means where:

a. The state does not pursue its alleged interest uniformly, because the fair housing statute permits all state-operated and private colleges and universities to exclude unmarried couples from campus housing, and because state law discriminates between married and unmarried couples in myriad other ways; and

b. The state offered no evidence that unmarried couples have serious difficulty finding housing?

TABLE OF CONTENTS

QUESTIONS PRESENTED I

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

ARGUMENT:

INTRODUCTION 1

I. IF THIS COURT DECLARES RFRA UNCONSTITUTIONAL, THIS COURT SHOULD *GVR* THIS CASE BACK TO THE CALIFORNIA SUPREME COURT TO RULE ON MRS. SMITH'S OTHER DEFENSES 2

II. IF THIS COURT UPHOLDS RFRA, THIS COURT SHOULD GRANT REVIEW ON THE IMPORTANT QUESTION OF WHAT CONSTITUTES "A SUBSTANTIAL BURDEN". 4

CONCLUSION 5

TABLE OF AUTHORITIES

Cases:

City of Boerne, Texas v. Flores,
No. 95-2074 . . . . . 2, 3

Dolan v. City of Tigard,
512 U.S. 374 (1994) 3

Employment Division v. Smith,,
494 U.S. 872 (1990) 3

Lucas v. South Carolina Coastal Council,
505 U.S. 1003 (1992) 3

Constitution and Statutory Authorities:

California Fair Employment and Housing Act 2

Religious Freedom Restoration Act (RFRA)
42 U.S.C. §2000bb . . . . . *passim*

United States Constitution, Amendment I . . . . . *passim*

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

No. 96-31

EVELYN SMITH,

PETITIONER,

v.

FAIR EMPLOYMENT AND HOUSING COMMISSION, KENNETH PHILLIPS, AND GAIL RANDALL,

RESPONDENTS.

SUPPLEMENTAL BRIEF

INTRODUCTION

This Court is apparently holding this case for the decision in *City of Boerne, Texas v. Flores,* No. 95-2074. At the time the petitioner wrote the cert petition last year (July 1996), she and her attorneys were unaware that this Court desired to address the question of the constitutionality of the Religious Freedom Restoration Act, 42 U.S.C. §2000bb *et seq.*

On Monday, June 23, 1997, petitioner learned that this Court had reconferenced this cert petition for the June 26, 1997 conference. This Court is expected to announce its decision in *City of Boerne* on Wednesday or Thursday, June 25 or June 26,

1997. Obviously, that decision will affect this Court's disposition of this cert petition.

Petitioner Mrs. Smith submits this supplemental brief under Supreme Court Rule 15.8 to address this Court's new decision in *City of Boerne v. Flores.* At this time, the decision has not yet been announced. But if petitioner waits for the decision to come down before writing a supplemental brief, this Court will have already voted in conference on Mrs. Smith's cert petition.

Therefore, petitioner submits this supplemental brief while there is still time before this Court rules on Mrs. Smith's cert petition. Petitioner assumes that this Court will either uphold RFRA or strike it down as unconstitutional. This supplemental brief will address both scenarios. Petitioner Mrs. Smith urges this Court in either case to grant review or GVR (grant, vacate and remand) the case back to the California Supreme Court.

I.

IF THIS COURT DECLARES RFRA UNCONSTITUTIONAL, THIS COURT SHOULD *GVR* THIS CASE BACK TO THE CALIFORNIA SUPREME COURT TO RULE ON MRS. SMITH'S OTHER DEFENSES

This case concerns the State of California's prosecution of Evelyn Smith for marital status discrimination under the California Fair Employment and Housing Act when she refused to rent one of her four townhomes to an unmarried couple because of her Biblical beliefs against sex outside of marriage. During the ten years this case has been in litigation, Mrs. Smith has asserted that the prosecution violates her rights under the Free Exercise Clause, as well as the Freedom of Speech Clause and her property rights under the Fifth and Fourteenth

Amendments. *See* cert petition at 28-29.

In a nutshell, Mrs. Smith claims two different "hybrid claims" under *Employment Division v. Smith,* 494 U.S. 872, 881 (1990), which trigger review under the compelling state interest test. The California Court of Appeal found that Mrs. Smith stated a claim of free exercise plus freedom of speech, because the state is coercing her to post signs she would not post on her own. Cert. Pet. App. 165a-171a.

Mrs. Smith also states a hybrid claim of free exercise plus property rights under the Takings Clause and the Fourteenth Amendment. The California Supreme Court has put this hybrid right clearly at issue with its ruling that Mrs. Smith must either violate her religious beliefs or sell her rental property.

There are at least two ways governmental action can effect a taking of property -- a physical intrusion, *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1015 (1992) or action that deprives the owner of economically viable use of the land. *Id.* at 1016. Here the state does both. First, the state commands a physical intrusion. The fair housing commission ordered Mrs. Smith to "cease and desist" her marital status discrimination, thereby forcing Mrs. Smith to allow people to occupy her town homes that she would not absent government coercion. This compelled physical intrusion violates her right to exclude others from her property. *See Dolan v. City of Tigard,* 512 U.S. 374 (1994).

The California Supreme Court focused on the RFRA claim and did not rule on Mrs. Smith's other defenses. If this Court declares RFRA unconstitutional, it should grant, vacate and remand the case back to the California Supreme Court for rulings on Mrs. Smith's other defenses of free exercise of religion, freedom of speech and property rights.

II.

IF THIS COURT UPHOLDS RFRA, THIS COURT SHOULD GRANT REVIEW ON THE IMPORTANT QUESTION OF WHAT CONSTITUTES "A SUBSTANTIAL BURDEN"

If this Court upholds the constitutionality of RFRA, then this Court should grant review in this case because it presents an important question of what constitutes "a substantial burden" under the statute. The main opinion, written by Justice Werdegar, ruled that the state had not substantially burdened Mrs. Smith's rights under the federal Free Exercise Clause or RFRA because she could "avoid the conflict, without threatening her livelihood, by selling her units and redeploying the capital in other investments." Cert. Pet. App. 32a.

The California Supreme Court fundamentally misunderstood where the conflict between the state law and the religious adherent's beliefs are in this case. This case is not about whether the State of California can legally prohibit Mrs. Smith from being a landlord when she feels a religious call from God to work as a landlord. The conflict is whether the State can punish Mrs. Smith for refusing on religious grounds to rent to an unmarried couple. The California Supreme Court found that there was no substantial burden on Mrs. Smith rights, even though she "is subject to civil penalties, a cease-and-desist order dictating her future conduct, and imprisonment, as Justice Kennard said in her dissent. (Cert. Pet. App. 80a).

The California Supreme Court makes RFRA useless to most people in California if the State can inflict this much punishment on someone and still evade meeting RFRA's requirement of a "substantial burden." The language of RFRA

must mean that Mrs. Smith has suffered a substantial burden. This Court needs to grant review and reverse the California Supreme Court's erroneous interpretation of "substanial burden" under RFRA.

In the alternative, this Court should GVR this case back to the California Supreme Court to reconsider its decision in light of this Court's decision upholding RFRA (if that is what this Court rules in *City of Boerne*).

CONCLUSION

Mrs. Smith is a 64-year-old widow who earns most of her income from renting her four townhouses in Chico, California. The California Supreme Court ruled that she has no defense in this case because she can abandon her profession as landlord and sell all of the housing that produces her livelihood. This Court should protect Mrs. Smith from her adversaries by reversing the callous decision below. Mrs. Smith urges this Court to grant cert in this case and reverse, or, alternatively, GVR this case back to the California Supreme Court.

Respectfully submitted,

WENDELL R. BIRD
BIRD & ASSOCIATES
1150 Monarch Plaza
3414 Peachtree Rd. NE
Atlanta, Georgia 30326
(404) 264-9400

JORDAN W. LORENCE*
CIMRON CAMPBELL
JANE E. HADRO
MARK N. TROOBNICK
Northstar Legal Center
Box 2074
Fairfax, Virginia 22031
(703) 359-8619
*Counsel of Record

June 24, 1997